88-281

No. ———

In The

Supreme Court of the United States

October Term, 1987

———o———

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLRIEGEL, on behalf of themselves and all others similarly situated,

Petitioners,

- against -

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Respondents.

———o———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

———o———

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Watson v. Fort Worth Bank and Trust,* 56 U.S.L.W. 4922 (U.S. June 29, 1988) *vacating and remanding,* 798 F.2d 791 (5th Cir. 1986), holding that subjective practices can be analyzed under the "disparate impact" model, requires reversal of the class certification decision in which the District Court erroneously ruled that the "disparate impact" model could not be applied to plaintiffs' claim of subjective practices, thereby disregarding overt class wide discriminatory policies and requiring proof of individual cases of "disparate treatment."

2. Whether by requiring plaintiffs to submit proof that other class members "felt aggrieved" and to submit further proof of their claims of discrimination at the class certification stage, the courts below erroneously compelled proof of the merits of the case in contravention of this Court's decision in *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974).

PARTIES TO THE PROCEEDINGS

Petitioners: Patricia Sheehan
Elizabeth Henoch, on behalf of themselves and all others similarly situated

Respondents: Purolator, Inc.
Purolator Courier Corp.

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Petitioners, Patricia Sheehan and Elizabeth Henoch, on behalf of themselves and all others similarly situated, pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

———o———

OPINIONS BELOW

The opinion of the Court of Appeals affirming the Order and Judgment of the District Court is as yet unreported. It is reproduced in Appendix A to this Petition at App. 1-21.[1]

The opinion on the merits of plaintiffs' individual claims is unreported. It is reproduced in Appendix B to this Petition at App. 22-34.

The opinion denying plaintiffs' class certification motion is reported at 103 F.R.D. 641 (E.D.N.Y. 1984). It is reproduced in Appendix C to this Petition at App. 35-69.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (Appendix D at App. 70-73) was entered on February 12, 1988. A timely motion for rehearing with a suggestion of rehearing *en banc* was filed; it was denied on April 13, 1988 (Appendix E at App. 74-75). A timely application for an extension of time within which to file a petition for writ of *certiorari* was made to this Court and was granted by the Chief Justice on July 12, 1988. This Petition is filed within the time granted by the Chief Justice (Appendix F at App. 76). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

1. References to the decisions below are hereinafter designated parenthetically as "App. —" followed by the Appendix page number(s) on which the referenced material appears.

RULES INVOLVED

Federal Rules Civil Procedure, Rule 23(a); (b)(2)

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

• • •

(b)(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

• • •

STATEMENT OF THE CASE

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), by plaintiffs Patricia Sheehan ("Sheehan"), Elizabeth Henoch ("Henoch") and Kayhan Hellriegal ("Hellriegel"), on behalf of themselves and a proposed class of female exempt (salaried) employees and former employees of Purolator Courier Corporation and Purolator Inc. ("defendants"/"Purolator"). The Complaint generally alleged that defendants unlawfully discriminated against plaintiffs, and the class of women

they sought to represent, in assigning them to lower paying, lower status positions, in promotion and transfer opportunities and in the payment to them of lower salaries and other benefits than those given to similarly-situated males. In addition, plaintiffs Sheehan and Henoch asserted that they were retaliated against for having filed charges of discrimination. *See* Title VII, 42 U.S.C. § 2000e-3(a). Plaintiffs requested injunctive relief and monetary compensation for back pay and other benefits lost by them and by members of the proposed class as a result of the defendants' unlawful practices. Plaintiffs sought to prove their claims under both the disparate impact and disparate treatment models for analysis of proof of discrimination claims. (*See* App. 41-46).

In March, 1983 plaintiffs moved, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, for class certification. That motion was denied in December, 1984. (*See* App. 41-69).

The individual claims of discrimination and retaliation alleged by plaintiffs Sheehan and Henoch were tried to the District Court from June 24 through July 3, 1985. The District Court issued its decision on May 27, 1987, dismissing all of plaintiffs' claims. (App. 22-34). Plaintiffs renewed their motion for class certification at the conclusion of the trial on the merits and, although in its decision on the merits the District Court acknowledged that plaintiffs' renewed motion was pending, it did not comment on it further. (*See* App. 23). Judgment was entered on June 2, 1987. On June 30, 1987, plaintiffs Sheehan and Henoch appealed from all adverse opinions and orders of the District Court below. The Court of Appeals for the Second Circuit affirmed the District Court. (App. 16). Judge Amalya Kearse dissented and would have

found the District Court's decision with respect to individual claims to be clearly erroneous. (App. 21).

Plaintiffs pray that a writ of *certiorari* issue with respect to the decisions below on class certification. In their analyses of plaintiffs' application for class certification, the courts below ignored plaintiffs' substantial factual showing and made fundamental errors of law in applying *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982). The District Court erroneously ruled that plaintiffs' claims could not be analyzed under the disparate impact model. (App. 41-46). *See Watson v. Fort Worth Bank and Trust*, 56 U.S.L.W. (U.S. June 29, 1988), *vacating and remanding* 798 F.2d 791 (5th Cir. 1986).[2] The District Court then compounded the error by requiring that plaintiffs submit proof by affidavits of employees, or other such proof that there was a class of employees that "felt aggrieved." (App. 52; *see also* 49-50). These errors resulted not only in the incorrect initial denial of the motion, but also permeated the erroneous assessment of the merits of the individual plaintiffs' claims. The District Court failed to correct its error on plaintiffs' renewed motion for class certification made at trial. In its final opinion the Court acknowledged the pending motion but did not comment further on it.

Judge Kearse, in her dissenting opinion, found "a considerable amount of evidence of gender discrimination" in the record. Yet, the Second Circuit and District Court ignored that considerable evidence; instead ruling that, since *Falcon*, class representatives are required to

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2. At the time of plaintiffs' appeal in this case, the Court of Appeals for the Second Circuit had already ruled that subjective practices could not be analyzed under the disparate impact model. *Rossini v. Ogilvy & Mather*, 798 F.2d 590, 604-05 (1986).

supply affidavits from class members not only to demonstrate the "existence of an aggrieved class", but also to show that other class members "feel aggrieved" in order to show typicality. (*See* App. 9, 49, 50, 52). The Second Circuit affirmed without comment this erroneous application of law.

The District Court committed clear error and abused its discretion in failing to recognize that subjective decisions at Purolator were being made in a highly sex-biased atmosphere and by officers and supervisors with company mandated sex-biased directives. The Second Circuit erroneously disregarded this highly probative evidence. Thus,

> 1. The District Court *never* mentioned Purolator's blatantly sex-biased written policies, which were distributed to all officers of the Company and "to all managers within the field organization, terminal managers, [and] those people having direct day to day responsibility for running the operations," and which were issued in 1971, renewed in 1975, and not withdrawn until shortly before trial in 1983 or 1984. Judge Kearse recognized the probative value of this evidence; the majority did not. (App. 20). Those policies and interpretations included:
>
> > 1.1 An express belief that "[t]he sex of the individual is more often related to job success than one might expect." "The sex of the employee is often related to turnover." (*Id.*)
> >
> > 1.2 An admonition that the amount of responsibility an employee may be allowed to assume should be related to the number of dependents. specifically, "[i]n the case of women applicants, the number and ages of children are important." Managers and supervisors also are directed to determine how the children are to be cared for while the "mother" works. (*Id.*)

> 1.3 An express preference for promoting men by instructing managers and supervisors that, "before deciding on a man for promotion" consider such highly subjective criteria such as the candidate's "heat resistance" and loyalty because "being loyal to the Company . . . . is a quality of *men* who are responsible for the success of its operation."

The District Court also ignored testimony that showed the sex-biased attitude of Purolator officials:

> 2. The District Court erroneously ignored an admission by Sheehan's supervisor that he did not take her request for transfer seriously because he knew she had children. This testimony not only demonstrated the biased attitude of her supervisor, but also showed that he took seriously and implemented the express policy that women with children were not to be given responsibility within Purolator. (*See* App. 19) (dissenting opinion).
>
> 3. It was erroneous for the District Court to ignore the testimony of a former male manager that he was told to pay women low salaries because they had husbands, and that based upon his management experience within Purolator, he observed women were paid less than their male counterparts, and that it was more difficult to get promotions or salary increases for women than for men. (*See* App. 21) (dissenting opinion).
>
> 4. The District Court erroneously refused to allow a witness to testify at trial that John Delany (both Henoch's and Sheehan's supervisor) told her she would not be considered for a position because no one would be respectful of a woman in that position. (*See* App. 17-18) (dissenting opinion).
>
> 5. The District Court and Court of Appeals also erroneously rejected plaintiffs' statistics in *toto* on the

ground that plaintiffs' regression analysis, which included all exempt employees, did not have variables for education and prior experience, even though defendant's expert testified that he could not state what effect, if any, including those variables would have on the results—and defendants offered no study of all exempt employees although it had the data available to do so. (*See* App. 9).

These errors, independently and cumulatively, so tainted the District Court's evaluation of plaintiffs' case as to have required reversal of both the class certification decision and the decision on the merits. The Second Circuit committed error by permitting the erroneous decisions to stand.

———o———

REASONS FOR GRANTING THE WRIT

I

THE DISTRICT COURT'S RULING, AFFIRMED BY THE SECOND CIRCUIT, THAT THIS CASE COULD BE ANALYZED ONLY UNDER THE DISPARATE TREATMENT MODEL IS CONTRARY TO THIS COURT'S DECISION IN WATSON v. FORT WORTH BANK AND TRUST, AND HAS RESULTED IN AN ERRONEOUS DENIAL OF PLAINTIFFS' CLASS CERTIFICATION MOTION.

In its decision on class certification, the District Court ruled that plaintiffs' claim that defendants' subjective practices had a "disparate impact" on its female employees could not be analyed under the "disparate impact" model (App. 41-46); that decision was affirmed by

the Second Circuit.[3] Directly to the contrary, this Court held in *Watson* that subjective or discretionary employment practices may be analyzed under the disparate impact model. 56 U.S.L.W. at 4926. The initial erroneous ruling adversely affected the District Court's decision not to certify a class because, as the District Court, and Purolator, acknowledged "the [Supreme Court's decision] in *Falcon* has been interpreted to have little effect on the certification of class actions in disparate impact cases." (App. 42). The District Court further explained that " '[d]isparate impact cases are conducive to class action status because the facts pertinent to each class member's claims are similar.' " (*Id.*)

In ruling on the class certification motion the District Court found it "crucial" to determine whether the plaintiffs' claims might be characterized as disparate impact claims. It mistakenly decided that they could not, and thereafter proceeded to analyze the class certification claims pursuant to what it believed to be a special approach to "disparate treatment" mandated by this Court's decision in *Falcon*. Under that approach, as Judge Kearse found in her dissenting opinion, the District Court ignored highly probative evidence of discrimination.

There had been excluded trial testimony from a female that a high ranking official would not give her a position because "no one would be respectful of a woman in [it]." As Judge Kearse observed, that statement "unambiguously revealed a dispositive view that there were certain posi-

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3. In *Rossini*, the Second Circuit also ruled that disparate treatment analysis must be applied to claims of subjective practices. 798 F.2d at 605. *Rossini*, therefore, controlled this issue when plaintiffs here appealed.

tions that women *qua* women should not occupy [at Purolator]." (App. 17). Judge Kearse further explained:

> *There was also a substantial amount of evidence that was not excluded that supported the claims of discrimination, much of which was never adverted to by the trial court.* For example, Duwain Weibe, a former manager at the company, testified that he had repeatedly attempted to obtain competitive salaries for women. *Top executives rebuffed his efforts, stating that any woman "probably [had] a husband working."*
>
> *One of the most probative items of evidence concerned Sheehan's request to John Nichols, her supervisor, to consider her for transfer to a position in the "field." This request was not honored. Why? Nichols testified: "I really didn't take [her request] seriously knowing that she had children . . . ."*
>
> . . . The majority's view—which was not adopted by the trial court—is that Nichols did not consider Sheehan for transfer simply because he doubted that she could earn more money in a field position, and that gender could not have been a factor because Nichols had recommended Sheehan for her promotion to Staff Vice President. The majority's reconstruction rests on two inappropriate premises. First is *the notion, which permeates the majority's defense of the decision below, that so long as an employer gives a female employee some opportunities, it may permissibly deny her other opportunities on the ground that she is a woman. See, e.g., id.* at 9 (finding no discrimination on the basis of gender because president approved Sheehan's promotion (to a job she did not prefer)). This notion hardly reflects Title VII's goal of equal opportunity. Second, the majority's conclusion that "gender was irrelevant" in Nichols's refusal to consider Sheehan for a field position is illogical unless Nichols would also have refused to

take seriously a transfer request by a man because the man had children. There is nothing in the record—or in experience—to support this supposition. To the contrary, *the record makes clear that elsewhere in the Company, managers were given written instructions, signed by the Company's highest officers, to be wary of giving substantial responsibility to "women" with children;* interviewers were instructed to determine how children would be taken care of while the "mother" worked.

[M]anuals of the Company's Transportation Department contained the following statements, among others:

> *—"The sex of the individual is more often related to job success than one might expect."*
>
> *—"The sex of the employee is often related to turnover."*
>
> *—"In the case of women applicants, the number and ages of children are important."*

The majority dismisses these manuals (which it describes as containing "arguably discriminatory" statements) by stating that they had "no applicability whatsoever to personnel decisions at Courier's corporate headquarters where appellants were employed." Majority opinion *ante* at 8. Though the manuals may not have been technically applicable to corporate headquarters, *they surely showed the attitudes of the corporate officers who signed them, and one of those officers was the Company's president.* I am at a loss to understand how a trier of fact, if it noted the president's endorsement of these statements, could reasonably reject as incredible the uncontradicted testimony that the president had said the Company was male-oriented.

In finding, however, that the Company had not engaged in sex discrimination against these plaintiffs, the trial court did not mention any of the blatantly

> *sexist written statements endorsed by the Company's top officers. Nor did it mention the testimony of Weibe, or the testimony of Nichols that he dismissed Sheehan's transfer request because she had children, or other evidence that supported plaintiffs' claim that the Company denied them certain job opportunities because they were women.*

(App. 19-21) (emphasis added).

Instead of focusing on the class wide applicability of defendants' blatantly sexist subjective policies, as Judge Kearse found to exist, the District Court embarked on a search for a multitude of individual cases, requiring plaintiffs not only to establish that there were "aggrieved persons in the purported class, primarily through affidavits from employees alleging discriminatory treatment, or other evidence establishing an aggrieved class," (App. 49-50) but also to demonstrate that "[t]he number of aggrieved employees so identified [ ] bear some statistically significant relationship to the size of the relevant parts of the employer's work force."[4] (App. 50).

This misguided approach to the Rule 23 motion was caused by the Court's earlier fallacious ruling that the case could not be analyzed as a disparate impact one. (App. 46). The Court thus became preoccupied with a show of hands from class members in order to certify a "disparate treatment" case, thereby eschewing the "considerable amount" of other class wide evidence found to exist by Judge Kearse.

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4. Plaintiffs sought to represent a class comprised of Purolator's exempt female employees.

The District Court's misapprehended legal conclusion also caused error in its evaluation of plaintiffs' statistical evidence offered on the Rule 23 motion. Plaintiffs offered an array of statistical evidence in support of their claims, including a regression analysis showing that on average Purolator's male exempt employees were earning between three and five thousand dollars per year more than Purolator's female exempt employees, and that the differences were statistically significant at 2 standard deviations or greater.[5] Plaintiffs also demonstrated, without contradiction by Purolator, that there was an underrepresentation of females in Purolator's exempt job categories, and that the underrepresentation was statistically significant at 2 standard deviations or greater.

Defendant(s) never challenged the validity of plaintiffs' statistical proof, and their expert testified that he could not tell what effect, if any, including other variables might have on the results of the regression analysis. Thus, plaintiffs' statistical evidence was largely unrebutted (*See Bazemore v. Friday*, — U.S. —, 106 S.Ct. 3000, 92 L.Ed.2d 315, 333 n.4 (1986).

The courts below discounted plaintiffs' statistical showing. As with the other "considerable" evidence of discrimination, the courts' disregarding the statistical evidence on the Rule 23 motion was improper and was based upon the unsound search for "intent." This view of proof in Title VII has been recently rejected by this Court as unnecessary. As this Court reasoned in *Watson*:

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5. Plaintiffs' regression analysis included variables for sex, age, years of service with Purolator, and job title. A study including these same variables and geographic location showed similar results.

> [Subtle racial] remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat. If any employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.

56 U.S.L.W. at 4926.

Like *Watson*, here the evidence offered by plaintiffs showing that defendants' subjective practices had a disparate impact on women should not have been ignored by either the District or Circuit Court. That evidence compelled certification of a class.

II.

BY REQUIRING PLAINTIFFS TO SUBMIT PROOF THAT OTHER PUTATIVE CLASS MEMBERS "FELT AGGRIEVED" AND TO SUBMIT FURTHER PROOF OF THEIR CLAIMS OF DISCRIMINATION AT THE CLASS CERTIFICATION STAGE, THE COURTS BELOW ERRONEOUSLY COMPELLED PROOF OF THE MERITS OF THE CASE IN CONTRAVENTION OF THIS COURT'S DECISION IN EISEN v. CARLISLE & JACQUELIN, 417 U.S. 156 (1974).

In this case, the Court of Appeals affirmed the District Court's denial of class certification "on the ground of lack of class-wide proof of an aggrieved class," (App. 7), holding that plaintiffs' statistical studies as well as other "considerable" evidence did not suffice to meet the requirements of *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982). (*See* App. 21) (dissenting opinion).

In *Falcon*, this Court held that the prerequisites to maintain a class action under Rule 23 of the Federal Rules

of Civil Procedure—numerosity, commonality, typicality and adequacy of representation—could not be presumed. 457 U.S. at 158 ("[I]t was error for the District Court to presume that respondent's claim was typical of other claims against petitioner.") The emphasis in *Falcon* was on so-called across-the-board cases where a single plaintiff was seeking to represent a class of both applicants and employees. *See* 457 U.S. at 158-59. *Falcon* did not overrule or modify this Court's earlier decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), which held that courts are not to conduct an inquiry into the merits at the class certification stage. *Id.* at 178. The decisions below twist *Falcon* to equate proof of the prerequisites of Rule 23 with proof of the merits.

In *Eisen*, this Court admonished that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177. The Court quoted Judge Wisdom in concluding that:

> In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

Id. at 178 (quoting *Miller v. Mackey International*, 452 F.2d 424 (5th Cir. 1971)). *See also Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 570-72 (2d Cir.), *cert. denied*, 459 U.S. 838 (1982). Here, however, both the District Court and the Second Circuit not only inquired into the merits of the plaintiffs' claims, but also required plaintiffs to prove the class claims of discrimination in order to have a class certified.

The significant problem with the courts' approach is that the plaintiffs here *never* had the opportunity to conduct full-fledged discovery on the merits of their class claims, but were permitted only limited discovery on class certification issues. Once the District Court denied class certification, discovery was limited to the individual claims. Indeed, during the trial, the District Court sustained defendants' objections, and *sua sponte*, excluded testimony because it was "not trying a class action." As Judge Kearse properly observed in her dissenting opinion, however:

> In finding, [ ] that the Company had not engaged in sex discrimination against these plaintiffs, *the trial court did not mention any of the blatantly sexist written statements endorsed by the Company's top officers. Nor did it mention the testimony of Weibe, or the testimony of Nichols that he dismissed Sheehan's transfer request because she had children, or other evidence that supported plaintiffs' claims that the Company denied them certain job opportunities because they were women.* Ordinarily I would say that a trial court need not mention each piece of evidence it has considered. *But where the trial judge has plainly erred by excluding some relevant proof of discrimination, thinking it was not relevant, I believe the reviewing court should be skeptical, rather than imaginatively generous, in interpreting the trial judge's complete silence as to the considerable amount of evidence of gender bias that is in the record.*

(App. 21) (emphasis added).

Under this Court's decisions in *Eisen*, and *Falcon*, plaintiffs offered sufficient proof to demonstrate likely classwide discrimination; indeed, Judge Kearse found a "considerable amount of evidence of gender discrimination." (*Id.*) That evidence should have been sufficient

for class certification. Instead, with respect to the class certification motion, the Second Circuit referred to plaintiffs' failure to adduce sufficient evidence to support their claims.[6] Similarly, the Second Circuit quoted approvingly from a Ninth Circuit decision affirming the lower court and stating that the district judge "was simply unpersuaded." (App. 10) (quoting *Penk v. Oregon School Bd.*, 816 F.2d 458, 465 (9th Cir.), *cert. denied*, 108 S.Ct. 158 (1987)). However, the *Penk* decision was reached after class-wide discovery and a nine-month trial, not on a motion for class certification. *See Penk*, 816 F.2d at 460.

In affirming the District Court's decisions, the Second Circuit simply merged the merits of plaintiffs' individual claims with the arguments as to class certification. For example, in its discussion of plaintiffs' appeal from the District Court's class certification decision, the Second Circuit stated that "*[a]t trial*, appellants relied heavily on their regression analysis." (App. 7) (emphasis added). In that same discussion, the Court framed the issue before it as whether a regression with less than all measurable variables can serve to "prove a plaintiff's case." (App. 8). Yet, it was not plaintiffs' burden to prove their class case in order to obtain class certification. Rather, plaintiffs had to show that the requirements of Rule 23 were met. The Second Circuit never addressed plaintiffs' claims with respect to the District Court's erroneous rulings as to the commonality and typicality requirements—again, ruling

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6. The Second Circuit was incorrect on the facts and law in its statement that the case was "analyzed . . . as one of disparate impact, requiring proof of discriminatory motive." (App. 6). The District Court treated the case as one of disparate treatment. (App. 41-46).

that there was a failure of class-wide proof. (*See* App. 10-11).

That the cases relied upon by the Second Circuit in discussing the plaintiffs' statistical showing on their motion for class certification all involved the level of proof required to prove discrimination after trial, is further evidence of its error (*See* App. 8, 10).

The Second Circuit's erroneous view of this case was revealed equally by its conclusion that the District Court's class certification decision was "not clearly erroneous" (App. 9-10), and by the cases cited by the Court in upholding the District Court's class certification decision as "plausible in light of the record," (App. 13) (quoting *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 822 F.2d 230, 240 (2d Cir. 1987))—again, the standard applied to factual findings after trial. The standard of review for a class certification decision, however, is whether the District Court abused its discretion. *See Rossini*, 798 F.2d at 594.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Dated: New York, New York
August 11, 1988

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 377 August Term, 1987

(Argued December 17, 1987 Decided February 12, 1987)

Docket No. 87-7540

(Filed February 12, 1988)

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLRIEGEL, on Behalf of Themselves and All Others Similarly Situated,

Appellants,

v.

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Appellees.

Before: TIMBERS, MESKILL and KEARSE, *Circuit Judges*

Appeals from two judgments entered in the Eastern District of New York, I. Leo Glasser, *District Judge,* deny-

ing respectively class certification and appellants' individual claims of sex discrimination in employment.

Affirmed.

Judge Kearse filed a dissenting opinion.

Judith P. Vladeck, New York, N.Y. (Joseph J. Garcia, Laura S. Schnell, and Vladeck, Waldman, Elias & Engelhard, New York, N.Y., on the brief), *for appellants.*

Colleen McMahon, New York, N.Y. (Morris B. Abram, Jay Cohen, Diana Hassel, and Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., on the brief), *for appellees.*

TIMBERS, *Circuit Judge*:

Patricia Sheehan and Elizabeth Henoch appeal from judgments entered after a bench trial in the Eastern District of New York, I. Leo Glasser, *District Judge*, denying respectively class certification (December 26, 1984) and appellants' individual claims of sex discrimination in employment (June 2, 1987).

The action was commenced under Title VII of the Civil Rights Act of 1964, as amended and codified at 42 U.S.C. § 2000e *et seq.* (1982).

On appeal, appellants claim that the court erred in denying class certification and in denying their individual claims. They raise a number of separate claims of error, including the following: that the court improperly evaluated their statistical evidence; that it erroneously required affidavits from class members; that it ignored probative

evidence of discrimination; and that it failed to consider the alleged discriminatory atmosphere at the company.

We hold that the court's findings were not clearly erroneous. We affirm.

I.

We shall summarize only those facts believed necessary to an understanding of the issues raised on appeal.

Appellees Purolator Courier Corp. ("Courier") and its parent, Purolator, Inc. (now defunct), provide pickup and overnight delivery of materials by ground and air throughout the United States. At all relevant times, Courier had corporate headquarters in New Hyde Park, New York and more than 200 offices, terminals and garages acress the country (collectively referred to as "the field"). Courier employed over 10,000 persons, including approximately 1,100 salaried (exempt) employees, on a full or part-time basis.[1]

Appellants, who held salaried positions with Courier, collectively alleged in their complaint filed February 19, 1982 that appellees engaged in a pattern or practice of discrimination against their female employees in job assignment of intimidation and sexual harassment of female em- and that they maintained and condoned a working environment of intimidation and sexual harrassment of female employees. Appellants also alleged that appellees retaliated against female employees who objected to the discriminatory policies and practices. Appellants sought class certification, injunctive relief and damages.

Backing up for a moment, Sheehan was hired in December 1971 as an office manager at Courier's corporate headquarters at a salary of $12,000 per year. After re-

ceiving several salary increases, she was promoted to Staff Vice President in charge of purchasing and office services at a salary of $28,000 per year. In January 1981, she and other women at Courier filed charges with the Equal Employment Opportunity Commission ("EEOC") alleging class-wide discrimination.

In March 1981, Courier's new president implemented a company-wide reorganization which included consolidating the Purchasing Department into the Transportation Department. Sheila Casey, a Courier Staff Vice President with more than twenty years tenure, became Corporate Vice President in charge of all purchasing, a newly created position. Sheehan at that time was to report to Casey, who in turn was to report to Paul Wolfrum, an officer of Courier. Sheehan retained her title, continued to coordinate office supply purchases, and was asked to take on added responsibilities. Courier asserts that, after Sheehan was told about the reorganization, she became uncooperative and contentious and frequently was absent or late. She filed a second charge with the EEOC, and then commenced the instant action.[2]

Sheehan claims that top management unlawfully retaliated against her for filing a discrimination claim, thus goading her into insubordination. Sheehan frequently complained that after the reorganization she did not know what her job duties were. After repeated attempts to clarify her duties, Wolfrum and Casey met with her on August 5, 1981. After Sheehan left the meeting twice, Wolfrum told her to return or face termination. She replied, "Then I am terminated." Courier fired her for cause and denied severance benefits.

Henoch was hired by Courier as a secretary in 1967. From then until March 1983, she worked in Courier's legal department at corporate headquarters. A non-lawyer, she performed para-professional duties, including preparing and filing with the Interstate Commerce Commission ("ICC") Courier's applications for interstate motor carrier operation authority and interstate tariffs. She also prepared protest forms for challenging the applications for motor carrier operating authority filed by the company's competitors. She received a number of staff position promotions, eventually becoming Staff Vice President. She was elected Assistant Corporate Secretary in 1972 and became the highest ranking non-lawyer in the legal department. In 1982 she was earning more than $38,000 per year.

Henoch obtained an ICC practitioner's license. Shortly thereafter, around 1978, massive federal deregulation occurred in the trucking industry. Henoch's duties were changed to encompass almost exclusively tariff work and her position was transferred to another department. She claims that this was a demotion resulting from sex discrimination by her supervisor, General Counsel John Delany. Henoch's job performance declined markedly. She filed charges with the EEOC on or about January 19, 1981 alleging employment discrimination. Courier asserts that changes in the regulatory environment eliminated many of Henoch's former duties. After Courier and its parent merged and moved to a consolidated headquarters in 1984, Henoch was named Director of Tariffs and Regulatory Compliance. She testified that her status improved after that reorganization.

Following our remand in 1981[3] and consolidation of the separate cases of Sheehan and Henoch,[4] they moved for class certification. The court denied certification. *Sheehan v. Purolator, Inc.*, 103 F.R.D. 641 (E.D.N.Y. 1984). The court analyzed the case as one of disparate impact, requiring proof of discriminatory motive. *Id.* at 645. This finding has not been challenged on appeal. The court denied class certification on two independent grounds: (1) appellants did not establish the existence of an aggrieved class; and (2) appellants failed to meet typicality requirements.[5]

Subsequently, on May 27, 1987, after a bench trial, the court dismissed all of appellants' sex discrimination claims on the merits.

This appeal from the court's 1984 and 1987 judgments followed.

Appellants claim that the district court erred in denying class certification and in denying their sex discrimination claims. Specifically, they claim that the court erred (1) in improperly evaluating statistical evidence; (2) in requiring affidavits from class members; (3) in ignoring probative evidence of discrimination; and (4) in failing to consider the alleged discriminatory atmosphere and sex-biased attitude of Courier management.

II.

We turn first to the claim that the district court erroneously denied class certification in its 1984 judgment.

The court held that the statistics submitted by appellants to establish the existence of an aggrieved class failed to withstand scrutiny. The court found that the statistics

comparing job titles, salaries and fringe benefits received by exempt male and female employees at Courier did not provide relevant comparisons of males and females with the same qualifications and experience, nor did the statistics alone indicate that other female employees felt aggrieved.

Appellants also submitted complaints by 56 employees, other than the named plaintiffs, alleging unequal treatment, harassment or retaliation. Courier challenged the relevance of all but one of those complaints. Based on appellants' failure to rebut the challenges, the court found that this evidence was of ambiguous probativeness. Accordingly, the court held that appellants failed to provide sufficient affidavits necessary to flesh out the statistics. The court further held that, although appellants suggested this deficiency was caused by fear of retaliation, on balance, the requirements of Fed. R. Civ. P. 23 took priority.

Finally, the court held that the named plaintiffs were inadequate class representatives.

Since we affirm the denial of class certification on the ground of lack of class-wide proof of an aggrieved class, we believe it is neither necessary nor appropriate to reach the question whether Sheehan and Henoch were inadequate class representatives.

With this summary of the court's class action decision in mind, we shall examine the evidence in support of that decision.

At trial, appellants relied heavily on their regression analysis, which showed wage disparities between exempt men and women employees, to prove the existence of a

certifiable class. They challenge the district court's holding that their statistics did not, by themselves, establish the existence of an aggrieved class of female employees. They claim that such a determination flies in the face of Supreme Court precedent that employment discrimination can be established by statistical proof, citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and *Basemore v. Friday*, 106 S.Ct. 3000 (1986) (per curiam). We disagree.

The Supreme Court in *Teamsters* recognized the importance "of using anecdotal evidence, when available, to bring 'the cold numbers convincingly to life.'" *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 604 (2 Cir. 1986) (citing *Teamsters, supra*, 431 U.S. at 339). "In evaluating all of the evidence in a discrimination case, a district court may properly consider the quality of any anecdotal evidence *or the absence of such evidence.*" 798 F.2d at 604 (emphasis added). As the Court reaffirmed in *Bazemore*, "plaintiffs must 'establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice.'" 106 S.Ct. at 3008 (quoting *Teamsters, supra*, 431 U.S. at 336). The Court observed, however, that the omission of variables from a regression analysis will affect the analysis' probativeness, but not its admissibility. *Id.* at 3009. Although a regression analysis including less than "all measurable variables" may serve to prove a plaintiff's case, whether it does so "will depend . . . on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant." *Id.*

The district court here received in evidence appellants' regression analysis, but it found it to be flawed. The court

was not clearly erroneous in so finding. The regression analysis did not take into account various relevant non-discriminatory factors such as education and prior work experience. Appellees introduced evidence that those factors indeed *could* explain the disparities. Appellants also introduced statistics comparing the job titles, salaries and fringe benefits received by exempt male and female employees. These statistics were even less probative than the regression analysis had been. There was no control for non-discriminatory factors. There were no distinctions for education, prior job history or job level.

Appellants adduced only a limited amount of other probative evidence to support their claims. Upon close scrutiny, the complaints introduced by appellants had little probative value. Appellees asserted that only eight of the 56 complaints submitted by appellants were by members of the proposed class of exempt employees; of those eight, only five resulted in formal complaints filed with governmental agencies; one of the five complaints was filed by a male employee and another was filed before the earliest date for inclusion in the proposed class. Appellees asserted that, of the three remaining complaints, two allegedly were dismissed for lack of probable cause to sustain the allegation of employment discrimination. We think it is significant that appellants did not seek to rebut this analysis.

Under these circumstances, we hold that the court was not clearly erroneous in concluding that only one such affidavit was relevant; and that submitting an affidavit from only one aggrieved employee, other than the named plaintiffs, was insufficient to establish a class of aggrieved individuals.

Appellants also introduced Transportation Department manuals (no longer in effect) containing arguably discriminatory statements. Evidence was adduced that those manuals had no applicability whatsoever to personnel decisions at Courier's corporate headquarters where appellants were employed. The personnel policy in effect at headquarters throughout the relevant period, as well as the employee handbook, reflected non-discriminatory policies. While we do not condone such manuals, there was evidence from which the factfinder reasonably could conclude that they were not in effect at corporate headquarters.

In *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), the Supreme Court held that the prerequisites to a class action under Rule 23(a) could not be presumed. *See Rossini, supra*, 798 F.2d at 597-98. The Court directed that there be a "rigorous analysis" to determine whether Rule 23(a) has been satisfied. *Falcon, supra*, 457 U.S. at 161. As we stated in *Rossini*, "In the wake of *Falcon*, courts have been generally strict in their application of the Rule 23(a) criteria." *Rossini, supra*, 798 F.2d at 597.

Applying these guidelines, we hold that the district court was not clearly erroneous. As the Ninth Circuit stated, "by finding fault and infirmities in the statistical evidence presented, the district judge was neither evading her responsibility to examine the evidence, nor placing impossible burdens on the plaintiffs. The judge was simply unpersuaded." *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 465 (9 Cir. 1987) (footnote omitted). In short, the district court's findings in the instant case that appellants' claims were not susceptible of class-wide proof

should not be set aside since they certainly were " 'plausible in light of the record viewed in its entirety' ", the standard established by the Supreme Court. *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 822 F.2d 230, 240 (2 Cir. 1987) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985)).

III.

This brings us to consideration of the district court's 1987 decision which rejected appellants' individual claims of sex discrimination.

Here again the court found unpersuasive the statistics showing salary disparities between exempt male and female employees for the same reasons set forth in its denial of class certification—non-discriminatory variables were omitted that explained the wage disparities and the male employees described were not truly comparable to either Sheehan or Henoch.

The court also found that appellants were not denied fringe benefits for non-discriminatory reasons. Their complaint centered on the denial of use of a company car. The court found that credible evidence established that both male and female employees whose work required business travel received use of a company car. Since the work of neither Sheehan nor Henoch required travel, their denial of the use of a company car did not constitute sex discrimination.

The court found that Sheehan's bonus depended on Courier's performance. Accordingly, that factor caused her bonus to fluctuate from year to year. As for Sheehan's claim of discriminatory denial of a transfer to "the field"

and the alleged corresponding opportunities for increased salary and advancement, the court found such claim was without merit. The court stated that it could not credit Sheehan's testimony that in 1979 Courier's president told her that the company was male-oriented, particularly in light of his approval of her promotion. The court also found that Sheehan had not specified to John Nichols (her one-time supervisor) the precise position in the field that she wished to fill. Moreover, the court observed that transfers from headquarters to the field were rare, and as many women were transferred as men. The court found that Sheehan's claims of sexual harassment were time-barred, and the incidents alleged were too isolated to prove an abusive working environment. The court found that Sheehan refused to cooperate with Courier's legitimate operations and that her own behavior led to her termination. In short, her gender was irrelevant.

The court likewise rejected Henoch's individual claims of sex discrimination. The court found that the diminution of her duties resulted from deregulation and her status as a non-lawyer in the legal department. These factors also contributed to the company's failure to promote her after she became the highest ranking non-lawyer in the department. She also indicated no interest in being transferred to a department where advancement would be possible for someone in her position. Her decline in performance justified a refusal to promote her. The court found that Courier did not retaliate against her after she filed EEOC charges. Indeed, the court found that her title, salary and benefits were unchanged.

In a private, non-class action under Title VII, the plaintiff has the burden of proving by a preponderance of

the evidence a prima facie case of discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If the plaintiff succeeds in making out a prima facie case, "the burden shifts to the defendant 'to articulate some legitimate, non-discriminatory reason for the employee's rejection.'" *Id.* at 253 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). At that point, the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Id.*

We hold that the court correctly concluded that appellants did not sustain their burden. If the trial court's findings are "plausible in light of the record", we must affirm, regardless of whether we as fact-finders would have weighed the evidence differently. *Banco Nacional de Cuba v. Chemical Bank New York Trust Co., supra*, 822 F.2d at 240. In light of all the evidence, we cannot say that the court was clearly erroneous. To the extent appellants may be said to have established a prima facie case, Courier articulated legitimate reasons for its treatment of appellants that were not proven pretextual. The court heard the evidence and made credibility findings—a function peculiarly within its province as the fact-finder.

As we have held in part II of this opinion, the court was not clearly erroneous in finding that appellants' statistics were insufficient, nor, as we also held above, do the Transportation Manuals introduced by appellants alter

this holding. The court's finding that Sheehan and Henoch failed to demonstrate that their experience and skills were comparable to the male employees with whom they compared themselves is plausible in light of the record.

Appellants point to testimony of John Nichols, referred to above, and Providence Balzano, who, like Henoch, was supervised by Delany. Sheehan claims that the court was clearly erroneous in finding that she was not discriminatorily denied a transfer to the field based on Nichols' response to her request. Nichols testified, "I really didn't take it [opportunity to go into the field] seriously knowing that she had children as I did, and I didn't really think that she meant that she would want to relocate and why would she really think that she would be doing better out there than in the office."

Although arguably Sheehan's request for a transfer to the field was precise enough, in the context of Nichols' entire testimony as well as other evidence in the record, we hold that it was reasonable for the court to find that Sheehan was not denied a transfer because she was female. Sheehan's request for a transfer was motivated by dissatisfaction with her salary. Nichols testified that he counselled Sheehan against a transfer to the field because he doubted that she could earn more there than at corporate headquarters. Evidence was adduced that in fact salaries for employees at corporate headquarters were on the average higher than salaries for employees in the field and that such transfers were rare. Moreover, Nichols had recommended Sheehan for her promotion to Staff Vice President, lending credibility to appellees' claim that discrimination was not a factor.

Henoch claims that the court abused its discretion in refusing to admit Balzano's testimony. The proffered testimony was that Delany had refused to allow Balzano to set up a claims prevention department because he believed that women could not effectively supervise others. Balzano's testimony was excluded by the court on the ground that it was relevant only to the class claims and not to the individual claims. Even if the court erred in excluding Balzano's testimony, the error was harmless. Assuming that the testimony would prove Delany's sexist attitude, it still would not establish company policy at headquarters. There is no evidence in the record that proves a pattern of discrimination toward appellants or toward female employees generally.

The court's finding that use of company cars was determined by a legitimate non-discriminatory factor—jobs requiring business travel—certainly was reasonable in light of the evidence. The court's findings on the sexual harassment and retaliation claims also were plausible. Sheehan's claims of harassment were time-barred. Although Henoch proved that Delany, her supervisor, was abusive, the record showed that his temper was manifested indiscriminately toward men and women, even his superiors.

The record establishes that Sheehan's difficulties stemmed primarily from her own behavior and refusal to accept the changes brought about by Courier's reorganization. Henoch's difficulties stemmed from changed circumstances in the industry, renedering her experience and skills much less valuable. Appellants' claims of a discriminatory atmosphere at Courier are equally unavailing. Neither the Transportation Department manuals nor Bal-

zano's excluded testimony suffice as proof. We are not persuaded that there was evidence in the record showing a pattern of discrimination.

To summarize:

Viewing the evidence adduced by appellants in the context of the entire record, we decline to say that the judge's findings were clearly erroneous. He heard the evidence and made credibility determinations. He was there. We were not.

Affirmed.

FOOTNOTES

1. Since the trial, Courier has been acquired by and now operates as a subsidiary of Emery Air Freight Corp.

2. Her motion for preliminary injunctive relief was denied. *Sheehan v. Purolator Courier Corp.*, 25 Fair Empl. Prac. Cas. (BNA) 1342 (E.D.N.Y. 1981). The court dismissed her complaint for lack of subject matter jurisdiction, on the ground that she had failed to obtain a requisite "right to sue" letter from the EEOC. We reversed. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877 (2 Cir. 1981).

3. *Supra* note 2.

4. A third plaintiff—Kayhan Hellriegel—who is not involved in the instant appeal, had filed discrimination charges against Courier on or about January 19, 1981. Her case also was involved in the consolidation and class action.

5. After the district court denied class certification, but before the trial began, Hellriegel settled her claims. Accordingly, she is not involved in the instant appeal.

Sheehan v. Purolator, Inc., #87-7540

(Filed February 12, 1988)

KEARSE, *Circuit Judge, dissenting:*

With due respect to the majority's deference to the factfinding of the district court, I must dissent from the decision to affirm the judgment dismissing the individual claims of plaintiffs Patricia Sheehan and Elizabeth Henoch that Purolator Courier Corp. (the "Company") discriminated against them in the terms and conditions of their employment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982). In my view, the trial court excluded probative evidence on the ground that it was not relevant, apparently disregarded admitted evidence that showed gender discrimination, and made findings that are clearly erroneous.

In support of the contention that Henoch had been discriminated against on the basis of her sex, plaintiffs offered, *inter alia,* the testimony of Providence Balzano, a witness who, like Henoch, had been supervised by John Delaney, the Company's Senior Vice President, Assistant Secretary, and General Counsel. The proffered testimony was that Delaney had refused to allow Balzano to set up a claims prevention department, stating as the reason, "no one would be respectful of a woman in that position." The trial court excluded the testimony on the ground that it was not relevant to Henoch's individual claim. Plainly this was error. Delaney's statement unambiguously revealed a dispositive view that there were certain positions that women *qua* women should not occupy. His statement that "no one" would respect a woman in the given posi-

tion may have reflected his own view, or it may have reflected either the views of the rest of management or his own belief as to the views of management. Whatever the source of the view stated by Delaney, however, the statement was surely relevant (as conceded by the Company at oral argument of this appeal) to whether gender was a factor in Delaney's—and thus the Company's—treatment of Henoch.

There was also a substantial amount of evidence that was not excluded that supported the claims of discrimination, much of which was never adverted to by the trial court. For example, Duwain Weibe, a former manager at the Company, testified that he had repeatedly attempted to obtain competitive salaries for women. Top executives rebuffed his efforts, stating that any woman "probably [had] a husband working."

One of the most probative items of evidence concerned Sheehan's request to John Nichols, her supervisor, to consider her for transfer to a position in the "field." This request was not honored. Why? Nichols testified: "I really didn't take [her request] seriously knowing that she had children . . . ." The district court, however, found that the reason Sheehan was not considered for a transfer was that she "did not tell John Nichols, Senior Vice President for Administration and her immediate supervisor, what position in the field she wished to fill." This finding is neither supported nor supportable. Nichols himself made no mention of such an explanation. The trial court made no mention of Nichols's actual explanation. In light of Nichols's own testimony that Sheehan's request was not taken seriously because she had children,

the Company's argument that Sheehan was not considered because she had not identified a specific position is an explanation that one would expect to see rejected by the fact-finder as pretext.

The majority concedes that "arguably Sheehan's request for a transfer to the field was precise enough," *ante* at 11, but it constructs a different basis on which to "hold that it was reasonable for the court to find that Sheehan was not denied a transfer because she was female." The majority's view—which was not adopted by the trial court—is that Nichols did not consider Sheehan for transfer simply because he doubted that she could earn more money in a field position, and that gender could not have been a factor because Nichols had recommended Sheehan for her promotion to Staff Vice President. The majority's reconstruction rests on two inappropriate premises. First is the notion, which permeates the majority's defense of the decision below, that so long as an employer gives a female employee some opportunities, it may permissibly deny her other opportunities on the ground that she is a woman. *See, e.g., id.* at 9 (finding no discrimination on the basis of gender because president approved Sheehan's promotion (to a job she did not prefer)). This notion hardly reflects Title VII's goal of equal opportunity. Second, the majority's conclusion that "gender was irrelevant" in Nichols's refusal to consider Sheehan for a field position is illogical unless Nichols would also have refused to take seriously a transfer request by a man because the man had children. There is nothing in the record—or in experience—to support this supposition. To the contrary, the record makes clear that elsewhere in the Company, managers

were given written instructions, signed by the Company's highest officers, to be wary of giving substantial responsibility to "women" with children; interviewers were instructed to determine how children would be taken care of while the "mother" worked.

Similarly, the majority finds no fault in the trial court's "state[ment] that it could not credit Sheehan's testimony that in 1979 Courier's president told her that the company was male-oriented," majority opinion *ante* at 9, notwithstanding the facts that Sheehan's testimony was not contradicted by the president and was supported by documentary evidence. Thus, manuals of the Company's Transportation Department contained the following statements, among others:

> —"The sex of the individual is more often related to job success than one might expect."
>
> —"The sex of the employee is often related to turnover."
>
> —"In the case of women applicants, the number and ages of children are important."

The majority dismisses these manuals (which it describes as containing "arguably discriminatory" statements) by stating that they had "no applicability whatsoever to personnel decisions at Courier's corporate headquarters where appellants were employed." Majority opinion *ante* at 8. Though the manuals may not have been technically applicable to corporate headquarters, they surely showed the attitudes of the corporate officers who signed them, and one of those officers was the Company's president. I am at a loss to understand how a trier of fact, if it noted the president's endorsement of these statements, could

reasonably reject as incredible the uncontradicted testimony that the president had said the Company was male-oriented.

In finding, however, that the Company had not engaged in sex discrimination against these plaintiffs, the trial court did not mention any of the blatantly sexist written statements endorsed by the Company's top officers. Nor did it mention the testimony of Wiebe, or the testimony of Nichols that he dismissed Sheehan's transfer request because she had children, or other evidence that supported plaintiffs' claims that the Company denied them certain job opportunities because they were women. Ordinarily I would say that a trial court need not mention each piece of evidence it has considered. But where the trial judge has plainly erred by excluding some relevant proof of discrimination, thinking it was not relevant, I believe the reviewing court should be skeptical, rather than imaginatively generous, in interpreting the trial judge's complete silence as to the considerable amount of evidence of gender bias that is in the record.

In sum, I, for one, am unable to conclude that the trial court's finding that the Company did not engage in discrimination against these plaintiffs on the basis of their sex was, in the words of *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985), "plausible in light of the record viewed in its entirety."

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PATRICIA SHEEHAN,	)	
Plaintiff,	)	
-against-	)	CV-81-1103
PUROLATOR, INC. and PUROLATOR COURIER CORP.,	)	
Defendants.	)	MEMORANDUM AND ORDER
PATRICIA SHEEHAN, ELIZABETH HENOCH and KAYHAN HELLRIEGEL, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	CV-82-0438
-against-	)	
PUROLATOR, INC. and PUROLATOR COURIER CORP.,	)	
Defendants.	)	

GLASSER, United States District Judge:

Plaintiffs in these consolidated actions assert claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Trial was held, without a jury, in June and July 1985.

Many of the background facts and contentions of the parties are summarized in the court's December 26, 1984 order denying plaintiffs' motion for class certification, Fed. R. Civ. P. 23. *Sheehan v. Purolator, Inc.*, 103 F.R.D. 641 (E.D.N.Y. 1984). There was one significant change in facts between the denial of class certification and the start of trial: plaintiff Kayhan Hellriegel settled her claims against Purolator, Inc. ("Purolator") and Purolator Courier Corp. ("Courier"). (For a discussion of the relationship between Purolator and Courier, see *id.* at 643 & n.1.) At the close of trial, plaintiffs renewed their motion for class certification.

The plaintiffs who went to trial were Patricia Sheehan and Elizabeth Kenoch. Both alleged that they suffered sex discrimination in employment at Courier.

American Courier, a predecessor of Courier, hired Sheehan as an office manager in 1971. On August 5, 1981, Paul Wolfrum, Senior Vice President for Transportation at Courier, fired Sheehan for gross insubordination in the presence of her immediate superior, Sheila Casey, and Casey's immediate superior, Wolfrum. At the time, Sheehan was a Staff Vice President in Administration for Courier.

Sheehan alleges that Courier was guilty of sex discrimination in salary and bonus, in fringe benefits, in denial of her request for transfer from a position as a staff officer to one in "the field," in permitting sexual harassment, and in retaliating against her for filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC").

American Courier hired Henoch in 1967 as a secretary. With her most recent promotion, in 1978, Henoch became a Staff Vice President. At the time of trial, Henoch was still employed by Courier as a Staff Vice President.

Henoch alleges that Courier was guilty of sex discrimination in diminishing her job duties, in permitting John M. Delany—who left Courier with the titles Senior Vice President, General Counsel, and Assistant Secretary—to harass her, in fixing her salary and bonus, in denying her fringe benefits, in denying her promotions, and in retaliation against her after she filed an EEOC charge.

The plaintiffs seek damages and injunctive relief. Specifically, Sheehan asks that she be reinstated to the position she would have occupied but for discrimination and retaliation by Courier, that she receive back pay (less mitigation), prejudgment interest, costs, and attorney's fees, and that Courier be barred from continuing to retaliate against her. Henoch asks that her job be reevaluated so that she will occupy a position to which she is entitled, and that she receive back pay (for salary, bonuses, and other benefits), prejudgment interest, costs, and attorney's fees. Like Sheehan, Henoch seeks an order enjoining Courier from retaliating against her.

The court has jurisdiction under Title VII, section 706(f), 42 U.S.C. § 2000e-5(f). For the reasons that follow, the court finds that neither Sheehan nor Henoch has carried her burden of proof on any Title VII claim. Accordingly, judgment shall enter in favor of defendant Courier.

I. *Patricia Sheehan*

A. *Salary and Bonus*

The court finds that Sheehan's salary and bonus were not determined in a discriminatory manner. She received a bonus tied to Courier's performance; thus, her bonus fluctuated from year to year. Sheehan's allegation that she was underpaid in comparison with certain male employees lacks merit, because she has failed to demonstrate either that her experience and skills are comparable to those of the male employees she deems comparable or that her job was similar to theirs. Sheehan's statistical evidence is not persuasive because it does not take into account non-discriminatory variables that explain disparities in pay.

B. *Fringe Benefits*

Sheehan's contention that Courier discriminated against her, as a woman, in providing fringe benefits centers on her allegation that she was denied a company car because of sex discrimination. The evidence shows that, before 1979, other women did receive company cars, if their jobs required travel. Sheehan's did not. Starting in 1979, Purolator, the parent of Courier, restricted the issuance of company cars and some men who had previously had such cars lost the fringe benefit. There is no credible evidence that Sheehan was denied fringe benefits because of sex discrimination.

C. *Transfer to the Field*

Sheehan alleges that opportunities for advancement in Courier, and the chance to make more money, were

more readily available to employees who worked in "the field." She says that this was her reason for seeking a transfer from headquarters to the field and that Courier's denial of her request was animated by sex discrimination. The court cannot credit Sheehan's testimony that Robert Ulrich, Courier's president in 1977, told her that Purolator was male-oriented and that he wanted nothing to do with "women's lib," especially in light of his approval, the following year, of Sheehan's promotion to Staff Vice President.

The court further finds that Sheehan did not tell John Nichols, Senior Vice President for Administration and her immediate supervisor, what position in the field she wished to fill. Moreover, although it was rare for employees to be transferred from headquarters to the field, nearly as many women made the move as did men. Sheehan now contends that the only cases of transfers from headquarters to the job she wanted in the field—profit center manager—involved men. But these transfers were rare enough (Sheehan points to four such transfers) and the qualifications of the men different enough from Sheehan's that the court cannot draw an inference of sex discrimination.

D. *Sexual Harassment*

The Supreme Court has held "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." *Meritor Savings Bank, FSB v. Vinson*, 106 S. Ct. 2399, 2405-06 (1986). But, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] em-

ployment and create an abusive working environment.'" *Id.* at 2406 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (brackets in *Meritor*). The incidents of which Sheehan complains are time-barred because they occurred before the cut-off date of March 25, 1980, 300 days before Sheehan filed EEOC charges, and did not progress uninterrupted into the limitations period. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). What is more, Courier would not seem to be liable for these incidents on a theory of agency, *see Meritor, supra*, 106 S. Ct. at 2408, because the incidents were too isolated to create an abusive working environment and because, to the extent that higher officials at Courier learned of the incidents, they apologized to Sheehan.

E. *Retaliation*

To succeed on her claim that Courier retaliated against her for filing EEOC charges, Sheehan is required to show "(1) statutorily protected participation [in EEOC proceedings]; (2) adverse employment action; and (3) a causal connection between the two." *Betts v. Sperry Division of Sperry Rand Corp.*, 556 F. Supp. 562, 567 (E.D.N.Y. 1983); *see, e.g., Jackson v. Missouri Pacific Railroad*, 803 F.2d 401, 406-07 (8th Cir. 1986). Because she has not demonstrated a causal connection, she has failed to make out a prima facie case.

The weight of the credible evidence shows that Sheehan began to act differently after she filed EEOC charges. On occasion, she left work early. She sought an extension of a loan she had procured from Courier. After Courier restructured some of its operations and Wolfrum promoted Casey to a position where Sheehan would be re-

quired to report to Casey, Sheehan left work for more than one month. After Sheehan returned to work, she was frequently absent and, when she was present, was often uncooperative and contentious. A recurring theme was Sheehan's complaint that she did not know what her job duties were. Yet Wolfrum's attempts to clarify Sheehan's job duties were met with Sheehan's continuing refusal to accept her responsibilities.

Things came to a head at a meeting among Wolfrum, Casey, and Sheehan on August 5, 1981. Once again, Wolfrum attempted to clarify Sheehan's job duties. Sheehan left the meeting twice. On the second occasion, Wolfrum directed her to return or fact termination. Sheehan answered, "Then I am terminated."

Courier fired Sheehan for cause and denied her severance benefits. Sheehan's employment contract justified denial of severance benefits to those fired for cause and, indeed, a male officer who had been fired (like Sheehan) for insubordination had been denied severance benefits.

The court finds that Sheehan resisted Courier's restructuring and that the promotion of Casey was justified by legitimate business concerns. Courier did not goad Sheehan into insubordination; to the contrary, she refused to cooperate with Courier's legitimate operations and brought about her own dismissal. Sheehan's gender was irrelevant to her treatment by Courier, and there was no retaliation against her by reason of her filing of EEOC charges.

II. *Elizabeth Henoch*

A. *Diminished Job Duties*

Henoch's job duties changed as the motor carrier industry was deregulated by Congress in the 1970s. Before 1978, Henoch spent most of her time working on applications for operating authority and identification of protest situations. This work dried up with deregulation of the industry.

With her former duties largely unnecessary, Henoch attempted to find other things to do. She became a licensed practitioner before the Interstate Commerce Commission ("ICC"), but this did not help Courier, because Henoch had been able to represent her employer before the ICC previously. In addition, Henoch began to undermine Delany's authority in the legal department and clashed with him about the role she would play in the department. The central problem for Henoch was that she was the highest ranking non-lawyer in the legal department, and Delany did not want her to take on the responsibilities that he believed belonged with licensed attorneys.

The diminution of Henoch's duties was not caused by sex discrimination. Instead, the industry had changed, and Henoch, as a non-lawyer, was poorly situated to adjust to that change from her vantage point in the legal department.

B. *Harassment by Delany*

Delany yelled at Henoch, often in an abusive manner. The record is clear, however, that Delany's treatment of Henoch was not the product of sex discrimination.

Delany's temper was manifested indiscriminately, against men and women both subordinate and superior to him.

C. *Salary and Bonus*

Henoch has failed to show that Courier discriminated against her on the basis of sex in fixing her salary and bonus. The male employees to whom she compared herself are not truly comparable, and Henoch's statistical evidence is flawed by the failure to take important variables (such as education and prior job history) into account. Studies prepared by Hay Associates, consultants hired by Courier, demonstrate that Henoch's compensation was within the range that could be expected in light of the factors Courier legitimately could consider. In other words, the salaries and bonuses received by Henoch were not lower than they should have been because of sex discrimination.

D. *Fringe Benefits*

As was the case with Sheehan, Henoch did not receive a company car because her job did not require travel. Other women at Courier's New Hyde Park office, who needed company cars, got cars. When Purolator restricted the issuance of company cars in 1979, many men who had such cars lost them. Henoch did not lose fringe benefits as the result of sex discrimination.

E. *Promotions*

Courier promoted Henoch five times; she became a Staff Vice President in 1978. That she was promoted no further is not, as she claims, the product of sex discrimination. Instead, as discussed above, Henoch was a victim

of the deregulation of the industry, which rendered many of her skills and much of her experience less valuable to Courier. As the highest ranking non-lawyer in the legal department, there was nowhere for Henoch to go. Courier had legitimate reasons not to promote her to a position where she would outrank the Associate General Counsel. What is more, Henoch indicated no interest in transferring to a department where advancement would be possible.

Aside from the impracticality of promoting Henoch, her performance justified a refusal to promote her. As discussed in connection with the diminution of Henoch's responsibilities, her performance deteriorated as deregulation took its toll on her job duties.

F. *Retaliation*

Nothing that happened to Henoch after she filed EEOC charges was the product of retaliation by Courier. Her job duties had changed earlier, because of other factors previously discussed. The court finds that Delany and Courier did not exclude Henoch from certain work after she filed the charges. Delany's supervision of Henoch's work and his displays of temper were essentially the same before and after Henoch filed charges.

After Delany resigned from Courier in January 1983, Henoch was transferred to the finance department, where she reported to Gerard Fitzmaurice. Her title, salary, and benefits were unchanged, and she retained her prior responsibilities. The court concludes that Courier did not retaliate against Henoch after she filed charges with the EEOC.

III. *Conclusion*

The familiar elements of a prima facie case under title VII were enumerated by the Supreme Court in the context of racial discrimination. The plaintiff is required to show

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (footnote omitted). The elements of a prima facie case may vary depending on the facts. *Id.* at 802 n.13. Sheehan's and Henoch's burden, mutatis mutandis, was to show that they were women; that they asked for and were qualified for promotions, higher compensation, or other benefits; that the things they sought were denied despite their qualifications; and that men with comparable qualifications got the things they sought.

If a plaintiff succeeds in making out a prima facie case,

> the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802. . . . [S]hould the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804.
>
> The nature of the burden that shifts to the defendant should be understood in light of the plain-

> tiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); *see Zahorik v. Cornell University,* 729 F.2d 85, 92 (2d Cir. 1984); *Grant v. Morgan Guaranty Trust Co. of New York,* 638 F. Supp. 1528, 1536 n.12 (S.D.N.Y. 1986); *see generally Daniels v. Board of Education of Ravenna City School District,* 805 F.2d 203, 206-10 (6th Cir. 1987).

To the extent that Sheehan and Henoch succeeded in making out prima facie cases, Courier has articulated legitimate reasons for its treatment of the plaintiffs, and the plaintiffs have been unable to demonstrate that those reasons were pretextual. Stated briefly, the court is satisfied that Sheehan's difficulties stemmed from her refusal to accept her position in Courier's hierarchy, and Henoch's difficulties resulted from changed circumstances in the industry. The more specific reasons for the court's findings rejecting each of the discrimination claims are set forth earlier in this memorandum and order.

The foregoing constitutes the court's findings of facts and conclusions of law. Fed. R. Civ. P. 52(a). The court shall enter judgment for defendants. *Id.* 58.

SO ORDERED.

/s/ I. Leo Glasser
United States District Judge

Dated: Brooklyn, New York
May 27th, 1987

Copies of the foregoing memorandum and order were mailed on this date to:

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PATRICIA SHEEHAN, Plaintiff,

v.

PUROLATOR, INC. and PUROLATOR COURIER CORP., Defendants.

PATRICIA SHEEHAN, ELIZABETH HENOCH and KAYHAN HELLRIEGEL, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

PUROLATOR, INC. and PUROLATOR COURIER CORP., Defendants.

Nos. 81 Civ. 1103, 82 Civ. 0488.

United States District Court, E.D. New York.

Dec. 26, 1984.

Following remand, 2nd Cir., 676 F.2d 877, and consolidation of cases, two former employees and one present employee bringing Title VII sex discrimination action against employer moved for class certification. The District Court, Glasser, J., held that: (1) fact that the case involved disparate treatment rather than disparate impact did not preclude class certification; (2) statistics offered by plaintiffs failed to establish existence of an aggrieved class; (3) plaintiffs' alleged fear of retaliation did not excuse lack of employee affidavits to substantiate existence of an aggrieved class; and (4) the plaintiffs, who were high level employees, and some of whose claims involved personal and individualized sets of facts, failed to meet typicality requirement to serve as class representatives.

Motion denied.

Judith P. Vladeck, Vladeck, Waldman, Elias & Engelhard, P.C., New York City, for plaintiffs.

Colleen McMahon, Paul Weiss, Rifkind, Wharton & Garrison, New York City, for defendants.

MEMORANDUM AND ORDER

GLASSER, District Judge:

This is an action for injunctive relief and damages brought by two former employees and one present employee of Purolator Courier Corporation ("Courier") against Courier and its parent corporation, Purolator, Incorporated (collectively referred to as "defendants").[1] The plaintiffs allege that the defendants engaged in a pattern or practice of discrimination against its female

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1. Defendant Purolator, Incorporated ("Purolator") had earlier moved to dismiss the complaint as against it for lack of subject matter jurisdiction, and initially opposed certification of a class of its employees on the grounds that Purolator and its subsidiary, Courier, are separate and distinct corporations. On January 4, 1984, well after both the moving and answering papers had been filed for this motion, Purolator announced that it and Courier were consolidating their headquarters, and the executive officers of Purolator were assuming responsibility for their respective functions at Courier. Purolator subsequently withdrew its motion to dismiss, but still maintains that the plaintiffs would not adequately represent the claims of Purolator employees. The plaintiffs contend that they have not had the opportunity to conduct discovery with respect to the effects of the consolidation, and therefore "reserve the right" to seek certification of a class of Purolator employees at some future date. In light of the above, plaintiffs are granted leave to move for certification of a class of Purolator employees after the completion of appropriate discovery regarding the effects of Purolator's consolidation with Courier. On the present motion, the Court is only considering certification of a class of Courier employees.

employees on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The plaintiffs now move for certification of this action as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure. For the reasons that follow, plaintiffs' motion is denied.

I. BACKGROUND

Plaintiffs seek certification of a class of all females who are presently employed, who subsequently become employed, and who have been employed by the defendants as exempt (*i.e.*, salaried) employees.[2] The parties agree that, with respect to former and current employees, the class should be limited to women employed by Courier on or since March 25, 1980, 300 days before plaintiffs filed their charges with the Equal Employment Opportunity Commission on January 19, 1981.

Plaintiffs collectively allege that defendants engage in a pattern or practice of discrimination against their female employees by, *inter alia:*

> assigning them to non-exempt and lower-level exempt positions; assigning males to line positions (*i.e.*, those which involve management and decision-making authority) while restricting female exempt employees to staff positions (*i.e.*, those which are supportive of line positions and involve no management or

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2. While plaintiffs' complaint describes female applicants who have sought or may subsequently seek employment with defendants as potential class members, plaintiffs do not now seek to represent a subclass of applicants. Plaintiffs maintain, however, that should the Court certify a class, plaintiffs "reserve the right" to seek amendment of any certification order to include applicants for employment as class members.

> decision-making responsibility); promoting females more slowly than similarly qualified males and by failing to promote them into positions with greater opportunity for advancement and training. Plaintiffs allege also that defendants pay females salaries lower than those paid to similarly qualified males and provide them with different and less favorable fringe benefits. Finally, plaintiffs contend that the defendants maintain and condone a working environment in which intimidation and sexual harassment of female employees is the normal condition of the workplace and that defendants retaliate against female employees who object to the discriminatory policies and practices.

Vladeck Aff. ¶ 3.

The individual plaintiffs are women who are, or have been, employed by defendants in exempt positions. Plaintiff Elizabeth Henoch is currently employed as a Staff Vice President and Assistant Secretary of Courier. In recent years, she has functioned as a paralegal and licensed Interstate Commerce Commission ("ICC") practitioner, handling a variety of matters for Courier before the ICC. Henoch's primary complaint is that she has allegedly received a lower salary than similarly situated men, and that she has been subjected to demeaning treatment and harassment on account of her sex. She further alleges that her duties and responsibilities were removed in retaliation for her filing charges of discrimination with government agencies.

Plaintiff Patricia Sheehan, at the time her employment was terminated, was employed by Courier as a Staff Vice President, Administration, in charge of purchasing and office services. Sheehan alleges that she was discrim-

inatorily denied both a transfer to a "line" position in the field and a promotion to Corporate Vice President For Purchasing, and that she was discriminated against in other terms and conditions of employment on account of her sex. She further alleges that she was harassed, her duties were removed, and she was eventually discharged on August 5, 1981, in retaliation for her filing sex discrimination charges against defendants.

Plaintiff Kayhan Hellriegel was employed by Courier as a Senior Regional Manager in Chicago. She claims that she was discriminatorily denied a promotion to Divisional Vice President after she refused the sexual advances of the individual making the selection. Hellriegel also alleges that she was subsequently subjected to harassment, and her responsibilities were reduced, until she felt compelled to resign her position.

The plaintiffs stated that they will primarily rely on statistical evidence to prove their prima facie case of discrimination on both the class and individual claims. Plaintiffs' Memorandum at 8. To this end plaintiffs submitted a variety of statistics assessing the relative numbers of men and women in various exempt job titles at Courier, as well as statistics comparing the salaries and fringe benefits received by exempt male and female employees. Vladeck Aff. ¶¶ 60-72. Plaintiffs intend to "bolster" their statistical case with anecdotal evidence, such as the specific experiences of the named plaintiffs in this action. Plaintiff's Reply Memorandum at 14-15.

Defendants contend that this action cannot be maintained as a class action in light of the Supreme Court's decision in *General Telephone Co. of the Southwest v.*

Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Defendants further contend that under Rule 23(a) of the Federal Rules of Civil Procedure, the named plaintiffs in this action cannot be certified as representatives of the proposed class. Lastly, the defendants argue that if any class is certified in this case, the class must be limited to the offices or areas where the named plaintiffs worked, and that the class should not include future employees who are not employed by Courier at the time of certification.

II. TITLE VII CLASS ACTIONS AFTER FALCON

In *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), the Supreme Court held that a Title VII plaintiff, who alleged that he had been discriminatorily denied a promotion, could not maintain a class action on behalf of both employees who were denied promotions and applicants who were denied employment. In *Falcon*, the named plaintiff was a Mexican American whose only personal claim was for an allegedly discriminatory denial of a promotion. On the class claims, the plaintiff sought to bring a broad-based challenge to a wide variety of allegedly discriminatory employment practices. The district court certified a class of all hourly Mexican American employees and applicants for employment, relying on the Fifth Circuit's "across the board" doctrine, under which "any victim of racial discrimination in employment may maintain an 'across the board' attack on all unequal employment practices alleged to have been committed by the employees pursuant to a policy of racial discrimination." 457 U.S. at 152-53, 102 S.Ct. at 2368, *citing Johnson v. Georgia*

Highway Express, Inc., 417 F.2d 1122 (5th Cir.1969). The Fifth Circuit affirmed the district court.

The Supreme Court expressed agreement with the "proposition underlying the across the board rule—that racial discrimination is by definition class discrimination. But the allegation that such discrimination occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that can be certified." 457 U.S. at 157, 102 S.Ct. at 2370-2371. After analyzing the named plaintiffs' class claims under Rule 23(a), the Court concluded that the district court erred in certifying the class on the presumption that the plaintiff's claim was typical of the class claims. In particular, the Court noted that the plaintiff failed to satisfy the typicality and commonality requirements of Rule 23(a), since "[he] attempted to sustain his individual claim by proving intentional discrimination" while trying to "prove the class claims through statistical evidence of disparate impact." *Id.* at 159, 102 S.Ct. at 2372. The Court emphasized that a "Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161, 102 S.Ct. at 2373.

A. *Disparate Impact or Disparate Treatment*

Plaintiffs contend that in the present case, both the individual and class claims can be considered under the "disparate impact" model of Title VII, and that disparate impact cases are still readily certifiable as class actions after *Falcon*. The decision in *Falcon* has been in-

terpreted to have little effect on the certification of class actions in disparate impact cases. *Nation v. Winn-Dixie Stores, Inc.*, 95 F.R.D. 82, 86 (N.D. Ga.1982). Defendants concede that "[d]isparate impact cases are conducive to class action status because the facts pertinent to each class member's claim are similar." Defendants' Memorandum at 28. It is therefore crucial to determine whether plaintiffs' individual and class claims may be characterized as "disparate impact" claims.

Disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that, in fact, fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive . . . is not required under a disparate impact theory." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36, n. 15, 97 S.Ct. 1843, 1854-55, n. 15, 52 L.Ed.2d 396 (1977). In a disparate treatment case, by contrast, the "employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Id.*

Plaintiffs contend that they state claims under the disparate impact theory in that the "subjective practices and criteria applied by male Courier supervisors and decision makers are discriminatory barriers and that women have not been afforded equal opportunity in terms and conditions of employment. . . ." Plaintiffs' Reply Memorandum at 11. Plaintiffs cite several cases which purportedly hold that the use of subjective practices and

criteria in personnel decision-making can be evaluated under the disparate impact theory. In *Hung Ping Wang v. Hoffman,* 694 F.2d 1146 (9th Cir.1982), a GS-11 level civilian employee in the Army Corps of Engineers challenged the Corps' failure to promote him to any of three GS-12 level positions. The action challenged the validity of a promotion system whereby supervisors determined the hiring criteria for a job on an ad hoc basis. A committee then reviewed the candidates for the position, ranked them based on the stated criteria, and then forwarded names of the highly ranked candidates to the department supervisor for final selection. The Ninth Circuit noted that the supervisors could manipulate the selection criteria to serve discriminatory purposes, and that "[s]ome seemingly objective criteria for hiring or promotion may have an inherently disproportionate impact." 694 F.2d at 1149. The court remanded the case for evaluation under the disparate impact theory.

Plaintiffs also rely on *Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc.,* 690 F.2d 88 (6th Cir.1982), where the plaintiff's former employer refused to rehire the plaintiff following a layoff. For hiring new employees, the employer required that the company's personnel manager, production superintendent, production manager and production foreman all examine the applicant's experience, training, references and appearance. The determination of whether to rehire former employees was left solely to the discretion of the foreman, for whom no guidelines were set forth. The Sixth Circuit held that employment decisions based on such subjective criteria

could me analyzed under the disparate impact theory. *Id.* at 93.[3]

The defendants cite *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795 (5th Cir.1982) as standing for the contrary view that subjective employment practices are not suitable for disparate impact analysis. In *Pouncy*, the plaintiff attempted to challenge three employment practices under the disparate impact theory: (1) the failure to post job vacancies; (2) the policy of promotion from within; and (3) the use of subjective criteria in employment evaluations. The Fifth Circuit explained that the

> disparate impact model applies only where an employer has instituted a specific procedure, usually a

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3. Plaintiffs also cite *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir.1980), *cert. denied* 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981), as standing for the proposition that a subjective employment practice, word of mouth hiring, was appropriately analyzed under the disparate impact the ry. A careful reading of that case reveals that the claim arising from word of mouth hiring was evaluated under the disparate treatment theory, while the employer's facially neutral requirement that experienced foremen be hired before inexperienced foremen was evaluated under the disparate impact theory. *Id.* at 1017. I also find that the plaintiffs' citation to *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982) is inapposite. The plaintiffs quote two passages from that opinion, out of context, to reach the tenuous conclusion that the Supreme Court "has recognized that barriers to equal employment opportunity are to be analyzed in terms of disparate impact." Plaintiffs' Reply Memorandum at 11. This statement, if true, would completely obfuscate the distinction between the disparate impact and disparate treatment theories, since any form of disparate treatment could be viewed as a "barrier to equal employment opportunity." I do not believe that the Supreme Court intended to so blur the distinction between the two theories that it carefully set forth in *International Brotherhood of Teamsters*, 431 U.S. at 335-36, n. 15, 97 S.Ct. at 1854-55, n. 15.

> selection criteria for employment, that can be shown to have a causal connection to a class imbalance in the work force.

Id. at 808. The court held that the disparate impact model was not appropriate in that case because the plaintiff had not shown "that a facially neutral employment practice . . . falls more harshly on black employees." *Id.* at 801. The Fifth Circuit subsequently interpreted *Pouncy* as holding that Title VII challenges to subjective employment practices may not be evaluated under the disparate impact model. *Carpenter v. Stephen F. Austin State University,* 706 F.2d 608, 620 (5th Cir.1983).[4]

As the above cases demonstrate, there is a conflict between the circuits as to whether the disparate impact model can be used to evaluate subjective employment practices. While there is no clear law on this issue in the Second Circuit, that court has indicated that it may follow the *Pouncy* approach. In *Zahorik v. Cornell University,* 729 F.2d 85 (2d Cir.1984), the court stated that the "disparate impact theory has been used mainly in the context of quantifiable or objectively variable selection criteria which are mechanically applied and have consequences roughly equivalent to results obtaining under systematic discrimination." *Id.* at 95. The court cited *Pouncy* for the proposition that "[p]laintiffs who allege a forbidden disparate impact are required to prove a causal connection between the challenged selection criterion and the disparate impact itself. . . ." *Id.* The court found that the

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4. Two other circuits have also recently applied the disparate treatment theory to Title VII claims arising from the use of subjective employment practices. *See Craik v. Minn. State Univ. Board,* 731 F.2d 465 (8th Cir.1984); *Lilly v. Harris-Teeter Supermarket,* 720 F.2d 326 (4th Cir.1983), *cert. denied,* — U.S. —, 104 S.Ct. 2154, 80 L.Ed.2d 539 (1984).

plaintiffs, who challenged the subjective criteria used for university tenure evaluations, failed to show that the challenged procedures produced any discriminatory effects: "evidence of systematic exclusion by the mechanical application of facially neutral criteria is necessary." *Id.* at 96. *Zahorik* suggests that in the Second Circuit, subjective employment practices can rarely, if ever, be challenged under the disparate impact theory.

However, even if *Hung Ping Wang* and *Rowe* were to be followed in this circuit, they are distinguishable from the present case. Neither case was a class action. In both cases, the plaintiffs attacked a specific selection procedure for promotion or hiring at a single level: in *Hung Ping Wang* it was the procedure for grade GS-11 to GS-12 promotion, and in *Rowe,* it was the procedure for hiring entry-level production employees. In the present case, plaintiffs are challenging employment decisions in areas such as promotion, training, transfer and compensation, made at all levels in the company's exempt workforce. Given the broad variety of employment decisions being challenged, it is impossible to identify "quantifiable or objectively verifiable selection criteria," *Zahorik,* 729 F.2d at 95, that would justify disparate impact analysis for both the individual and class claims in this case. Accordingly, the appropriateness of class certification in this case must be determined within the context of the disparate treatment model.

B. *Class Certification in Disparate Treatment Cases*

Defendants contend that after *Falcon,* disparate treatment Title VII cases are "inherently inappropriate" for class action status, and therefore the present action cannot be maintained as a class action. This contention is con-

tradicted by both the plain language of the *Falcon* decision and the numerous post-*Falcon* cases that have considered class certification in disparate treatment cases.

The primary significance of the *Falcon* holding, as conceded by defendants,[5] is that plaintiffs in Title VII class actions, like plaintiffs in all class actions, must meet the requirements of Rule 23(a). Defendants seek to expand this holding into a per se rule that disparate treatment Title VII cases should never be certified as class actions. However, the Supreme Court rejected such a per se approach by indicating in *Falcon,* that under certain circumstances, disparate treatment cases could be certified as class actions: "Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." 457 U.S. at 159, n. 15, 102 S.Ct. at 2371-72, n. 15.

Numerous courts since *Falcon* have considered the question of whether to certify class actions in disparate treatment cases. Some courts have certified class actions in such cases,[6] while other courts have denied class certification.[7] None of those courts adopted defendants' con-

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5. Defendants' Memorandum at 24.

6. *See Craik v. Minn. State Univ. Board,* 731 F.2d 465 (8th Cir. 1984); *Lilly v. Harris-Teeter Supermarket,* 720 F.2d 326 (4th Cir. 1983), *cert. denied* — U.S. —, 104 S.Ct. 2154, 80 L.Ed.2d 539 (1984); *Richardson v. Byrd,* 709 F.2d 1016 (5th Cir.), *cert. denied sub nom. Dallas County Comm'ners Court v. Richardson,* — U.S. —, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983); *Carpenter v. Stephen F. Austin State University,* 706 F.2d 608 (5th Cir. 1983); *Paxton v. Union National Bank,* 688 F.2d 552 (8th Cir.

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tention that disparate treatment cases are inherently inappropriate for class action status. To the contrary, both the Fifth and Ninth Circuits, in cases denying class certification, recognized that even "across the board" class actions could be maintained if there is significant proof of a general policy of discrimination. *Vuyanich v. Republic National Bank of Dallas*, 723 F.2d 1195, 1199 (5th Cir. 1984), *cert. denied* — U.S. —, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984); *Jordan v. County of Los Angeles*, 713 F.2d 503, 504 (9th Cir.1983), *amended* 726 F.2d 1366 (9th Cir. 1984). In all of these post-*Falcon* cases, the courts analyzed the class and individual claims under Rule 23(a) before determining whether to grant or deny class certification. Thus, the clear import of *Falcon* is not that disparate treatment claims are inherently unsuitable for class certification, but that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Falcon*, 457 U.S. at 161, 102 S.Ct. at 2373.

III. RULE 23 ANALYSIS

A. *The Existence of an Aggrieved Class*

The individual plaintiffs must satisfy four prerequisites to maintain a class action: numerosity, commonality,

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(Continued from previous page)

1982) *cert. denied* 460 U.S. 1083, 103 S.Ct. 1772, 76 L.Ed.2d 345 (1983); *Brown v. Eckerd Drugs, Inc.*, 564 F.Supp. 1440 (W.D. N.C.1983); *Johnson v. Montgomery County Sheriff's Dep't*, 99 F.R.D. 562 (M.D.Ala.1983).

7. *See Gilchrist v. Bolger*, 733 F.2d 1551 (11th Cir.1984); *Ekanem v. Health and Hosp. Corp. of Marion County*, 724 F.2d 563 (7th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 93, 83 L.Ed.2d 40 (1984); *Vuyanich v. Republic National Bank of Dallas*, 723 F.2d 1195 (5th Cir.1984); *Jordan v. County of Los Angeles*, 713 F.2d 503 (9th Cir.1983), amended, 726 F.2d 1366 (9th Cir.1984).

typicality and adequacy of representation. Fed.R.Civ.P. 23(a).[8] Plaintiffs in a class action have the burden of of establishing that the requirements of Rule 23(a) have been satisfied. *Greeley v. KLM Royal Dutch Airlines*, 85 F.R.D. 697, 700 (S.D.N.Y.1980). In the context of a Title VII class action, the Supreme Court has explained that:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For respondent to bridge that gap, he must prove much more than the validity of his own claim.

Falcon, 457 U.S. at 157-58, 102 S.Ct. at 2371. Thus in *Falcon*, the Court held that it was error for the district court to presume that the individual plaintiff's claim was typical of other claims against the plaintiff's employer. *Id.* at 158, 102 S.Ct. at 2371.

To "bridge" this conceptual gap, courts in Title VII actions after *Falcon* have required that the individual plaintiffs establish that there are aggrieved persons in

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8. Rule 23(a) provides:
One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

the purported class, primarily through affidavits from employees alleging discriminatory treatment, or other evidence esablishing the existence of an aggrieved class. *See Grant v. Morgan Guaranty Trust Co. of New York,* 548 F.Supp. 1189, 1193 (S.D.N.Y.1982); *Warren v. ITT World Communications,* 95 F.R.D. 425, 429-30 (S.D.N.Y. 1982); *Hawkins v. Fulton County,* 95 F.R.D. 88, 93 (N.D. Ga.1982); *Nation v. Winn-Dixie Stores, Inc.,* 95 F.R.D. 82, 88 (N.D.Ga.1982); *Benson v. Little Rock Hilton Inn,* 30 Empl.Proc.Dec. (CCH) ¶ 33,188 (E.D.Ark.1982). The number of aggrieved employees so identified must bear some statistically significant relationship to the size of the relevant parts of the employer's work force. *Nation,* 95 F.R.D. at 88; *Hawkins,* 95 F.R.D. at 93. Even prior to *Falcon,* some courts refused to certify Title VII class actions where the plaintiffs had failed to produce affidavits or other evidence establishing the existence of an aggrieved class. *See Wright v. Stone Container Corp.,* 524 F.2d 1058, 1062 (8th Cir.1975); *Richardson v. Restaurant Marketing Associates, Inc.,* 83 F.R.D. 268, 270 (N.D.Cal.1978); *Steffin v. First Charter Financial Corp.,* 77 F.R.D. 498, 500 (C.D.Cal.1978).

In the present case, the plaintiffs have submitted an affidavit from only one aggrieved employee, other than the three named plaintiffs, to establish the existence of a class of aggrieved individuals that contains some indeterminate number of members in excess of 315 persons. Plaintiffs' Memorandum at 6. Plaintiffs also rely on two forms of statistics to establish the existence of an aggrieved class: (1) statistics on the number of Courier employees who have "complained" of employment discrimination; and (2) statistics comparing the relative num-

ber of men and women in various job titles at Courier, as well as statistics comparing the salaries and fringe benefits received by exempt male and female employees.

As to the first type of statistics, plaintiffs claim that 56 female Courier employees, other than the named plaintiffs, "have complained of unequal treatment, harassment or retaliation." Vladeck Affidavit ¶ 73. Defendants persuasively argue, however, that upon close scrutiny, these statistics do not establish the existence of an aggrieved class. Defendants claim that only eight of the 56 complaints were brought by members of the proposed class of exempt employees. Of those eight complaints, only five resulted in formal complaints filed with governmental agencies. One of these five complaints was filed by a male employee alleging sexual harassment, and another was filed before March 25, 1980, the earliest date for inclusion in the proposed class. Therefore, neither of these complaints encompassed a potential class claim. Of the three remaining complaints, two were allegedly dismissed for lack of probable cause to sustain the allegation of employment discrimination. Cohen Affidavit ¶¶ 8-12; Defendants' Memorandum at 82. Plaintiffs have not attempted to rebut defendants' analysis of these statistics. *See* Plaintiffs' Reply Memorandum at 18. Given the ambiguities regarding the accuracy and meaning of these statistics, it was incumbent upon plaintiffs to explain the specifics of the purported discrimination complaints. *Benson*, 30 Eml.Prac.Dec. (CCH) ¶ 33,188, at 27,704. Since plaintiffs have failed to do so, these statistics cannot be relied upon to establish the existence of class claims.

Plaintiffs also rely on statistics comparing the job titles, salaries and fringe benefits received by exempt male

and female employees at Courier. These raw statistics do not, by themselves, establish that there is an aggrieved class of female employees. *Grant*, 548 F.Supp. at 1192 n. 6. The statistics do not offer the relevant comparisons of similarly situated female and male employees (i.e., females and males with the same qualifications and experience), *Pegues v. Mississippi State Employment Service of Mississippi Employment Sec. Comm'n*, 699 F.2d 760, 766-67 (5th Cir.1983), nor do the statistics alone indicate that other female employees feel aggrieved. *Steffin*, 77 F.R.D. at 500. Affidavits from individual employees are needed to flesh out these statistics by particularizing instances where females were discriminated against in favor of similarly situated males. The plaintiffs have failed to provide such affidavits.

It is noteworthy that the defendants specifically mentioned the need for affidavits in their Memorandum, but the plaintiffs responded by providing only one affidavit from an aggrieved female employee. The plaintiffs' attorney explained at oral argument that this deficiency was due to the fear that employees who submitted affidavits might be subject to retaliation. Tr. of Oral Argument at 15. While the plaintiffs' concern for the vulnerability of these employees is understandable, this concern must be balanced against the policies embodied in the *Falcon* decision and Rule 23(a). *Cf. Steffin*, 77 F.R.D. at 500-01 (discussing the balance of considerations between employees' fears of retaliation and the Rule 23(a) requirements). This Court cannot certify a Title VII class action without specific proof of the "existence of a class of persons who have suffered the same injury" as the plaintiffs. *Falcon*, 457 U.S. at 157, 102 S.Ct. at 2371. The appropriate mechanism to redress plaintiffs' fears of retaliation is not the

certification of class actions on the basis of unsubstantiated class claims, but the statutory protection accorded Title VII claimants under 42 U.S.C. § 2000e-3.

In conclusion, the plaintiffs have failed to sufficiently demonstrate the existence of an aggrieved class. The plaintiffs' motion for class certification must therefore be denied. However, even if the plaintiffs sufficiently demonstrated the existence of an aggrieved class, the named plaintiffs in this action are not appropriate representatives of a class of all exempt female employees at Courier.

B. *Appropriateness of the Class Representatives Under Rule 23(a)*

1. *Elizabeth Henoch*

Henoch was hired by Courier as a secretary in 1967. During the first eleven years of her employment at Courier, Henoch enjoyed a steady series of promotions: to Assistant Manager of the Commerce Department in 1968, to Manager of the Commerce Department in 1971, to Staff Assistant Vice President in the Legal Department in 1975, and to Staff Vice President in the Legal Department in 1978. She was also elected Assistant Secretary of the Corporation in 1972. Henoch's salary increased from $100 per week in 1967 to $38,000 per year in 1982. Henoch's job was transferred to the Finance Department in March 1983. McMahon Aff. ¶¶ 9, 15.

During the course of her employment, Henoch became primarily responsible for preparing and filing Courier's applications for interstate motor carrier operating authority and tariff approvals with the ICC. In 1977, she became a licensed ICC practitioner. Vladeck Aff. ¶¶ 11-12;

Delany Aff. ¶¶ 3-8. Henoch contends that despite her officer's title and responsibilities, her salary did not "keep pace with that of any of the men of comparable responsibility or status." Vladeck Aff. ¶ 12.

Henoch complains that she has been subjected to harassment and stripped of her job functions in retaliation for filing charges of discrimination with governmental agencies. In particular, she contends that she has received unwarranted criticism of her job performance, she has been subjected to verbal abuse by her supervisor, she lost the services of her secretary, and much of her work has been reassigned to other employees. Vladeck Aff. ¶¶ 14-15. Defendants contend that Henoch's job performance has deteriorated since 1978, and that the reduction of her responsibilities was the result of both deregulation of the trucking industry since 1978 and Courier's acquisition of "general commodity authority," precluding the need for numerous ICC applications. Delany Aff. ¶ 10-32.

In light of this employment history, Henoch's claims do not meet the commonality or typicality requirements necessary to qualify her as a class representative under Rule 23(a).[9] First, the interests inherent in Henoch's

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9. The Supreme Court has noted that:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

457 U.S. at 157-58 n. 13, 102 S.Ct. at 2371 n. 13.

status as a high level employee render her an inappropriate representative for a class that includes *all* female exempt employees of Courier. *Rowe v. Bailar*, 26 FEP Cases (BNA) 1145, 1146-47 (D.D.C.1981); *Odom v. U.S. Homes Corp. of Texas*, 76 F.R.D. 381, 383 (S.D.Tex.1975); *Fujita v. Sumitomo Bank of California*, 70 F.R.D. 406, 410 (N.D.Cal.1975). *See also Gilchrist v. Bolger*, 733 F.2d 1551, 1554 (11th Cir.1984) (nonsupervisory employee could not adequately represent a class of supervisory employees); *Lo Re v. Chase Manhattan Corp.*, 431 F.Supp. 189, 197-98 (S.D.N.Y.1977) (plaintiffs in professional, managerial or official positions could not adequately represent employees in lower graded positions).[10] Similarly, Henoch's suc-

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10. The defendants contend that simply by virtue of being a corporate "officer," Henoch is barred from acting as a class representative of exempt female employees, citing *Rossini v. Ogilvy & Mather*, 80 F.R.D. 131 (S.D.N.Y.1978). This argument, which emphasizes form over substance, is not persuasive. The defendants admit that Henoch's title, "Staff Vice President," is equivalent to the non-officer title of "Director." In the wake of the corporate reorganization of Courier, "[e]xempt employees who would have once been given the title of 'Staff Vice President' are now being given the title of 'Director;' no new Staff Vice Presidents are being named." McMahon Aff. ¶ 24. The functionally insignificant fact that Henoch is given the title of "Staff Vice President" rather than "Director" should not alone determine her suitability as a class representative. Furthermore, defendants' citation to *Rossini* is inapposite. In *Rossini*, the court held that a Vice President of a corporation could not properly represent the interests of a class of the corporation's employees. The court reasoned that the plaintiff in that case had an inherent conflict of interest with the class members because the plaintiff was empowered to bind the corporation to any action "in the ordinary course of business which the [board of] directors can authorize or ratify." 80 F.R.D. 135-36. The court further found that the plaintiff was obligated to assure "compliance by the corporation with

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cess in achieving a high level position and relatively high salary belies the typicality of her claims when compared with the claims of lower level employees who believe that they were discriminatorily denied such opportunities. *Rowe v. Bailar*, 26 FEP Cases (BNA) at 1147; *Ricks v. Schlesinger*, 24 FEP Cases (BNA) 694, 696 (D.D.C.1979).

Of particular relevance to this case is the decision in *Rowe v. Bailar*. The plaintiff in that case, Yancey Rowe, was a high level managerial and supervisory postal service employee, grade PES-26, who complained about the postal service's failure to promote him to higher level positions. The plaintiff sought to represent a class of all black employees who were discriminated against by various practices relating to promotion and training. A magistrate certified a class of employees at grade PES-17 and above. On appeal, the district court held that *Rowe* could not even represent the narrower class of employees at grade PES-17 and above:

> Rowe is an individual whose progress through promotions to a high managerial level has been excellent and who alleges discrimination as to promotion to specialized executive positions above that level. His experience at the Postal Service is hardly typical of the

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proper personnel policies and lawful hiring and promotion practices." *Id.* at 135. In the present case, by contrast, there is no indication that Henoch had the power to bind Courier by any actions, except perhaps in matters before the I.C.C. Nor is there any indication that Henoch had obligations with respect to the formulation or implementation of Courier's personnel policies and practices. Accordingly, Henoch does not have the same inherent conflict of interest with class members as did the plaintiff in *Rossini*. For the same reasons, *Rossini* is also inapplicable to the question of Sheehan's suitability as a class representative. See Section III.B.2., *infra*.

> widespread acts of discrimination he wishes to attack on behalf of the class.

26 FEP Cases at 1147.[11]

In the present case, Henoch is a high level employee who seeks to challenge a variety of discriminatory practices with respect to salary, promotion and other terms and conditions of employment. Yet she seeks to represent a class that is even broader than the class rejected in *Rowe*. The proposed class of female exempt employees includes employees at many levels in the corporate hierarchy, ranging from secretaries and customer service representatives to officers and professionals like Henoch herself. Defendants' Supplementary Memorandum at 13. *See also* Vladeck Aff. ¶ 47 (listing "natural lines . . . of progression" at Courier which include such positions as management trainee, sales representative, courier guard, etc.). The interests of secretaries and customer-service representatives may not be co-extensive with the interests of a Staff Vice President or Director. Nor can it be assumed that the same practices and criteria are applied to employment decisions involving low level and high level employees.

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11. The plaintiff argues that *Rowe* is distinguishable from the present case because Rowe received "favored treatment" from his employer and he asserted general and vague claims of discrimination. There is no indication in the *Rowe* opinion that Rowe received "favored treatment." Furthermore, Rowe made specific allegations for his personal claims, 26 FEP at 1147 n. 10, but made general and conclusory class claims. *Id.* at 1146. Likewise in the present case, Henroch has particularized her individual claims, but the plaintiffs have failed to identify specific acts of discrimination with respect to the class claims. *See* the discussion in Section III. A, *supra*. *Rowe* is not, therefore, distinguishable from the present case.

Henoch is also an inappropriate class representative because of the particularly unique circumstances of her employment. Until after commencement of the present action, Henoch was the highest ranking and highest paid non-lawyer in the Legal Department at Courier. Delany Aff. ¶ 25. Her job entails the use of specialized para-professional training. The trial of her claims regarding the alleged removal of her responsibilities will necessarily focus on the effects of deregulation in the trucking industry and Courier's acquisition of general commodity authority. Such facts are not related to any of the class claims. An employee who occupies a special position and whose claims of discrimination involve unique defenses is not an appropriate class representative for allegations of systematic discrimination. *See Williams v. Boorstin*, 451 F.Supp. 1117, 1124 (D.D.C. 1978), *rev'd on other grounds*, 663 F.2d 109 (D.C.Cir.1980), *cert. denied* 451 U.S. 985, 101 S.Ct. 2319, 68 L.Ed.2d 842 (1981); *Martin v. Easton Pub. Co.*, 73 F.R.D. 678, 681 (E.D.Pa1977); *Odom v. U.S. Homes of Texas*, 76 F.R.D. 381 (S.D.Tex.1975).

Lastly, Henoch's claim that she has been the victim of retaliation for filing charges of employment discrimination is not suitable for class treatment. A claim of retaliatory treatment, requiring proof of facts unique to the particular plaintiff, "is clearly not a class issue. . . . Indeed, preoccupation with peculiar retaliatory wrongs allegedly done to one may well make such a person an inadequate representative of the class." *Strong v. Arkansas Blue Cross & Blue Shield, Inc.*, 87 F.R.D. 496, 511 (E.D.Ark.1980). *See also Pendleton v. Schlesinger*, 73 F.R.D. 506 (D.D.C.1977), *aff'd sub nom. Pendleton v. Rumsfeld*, 628 F.2d 102 (D.C.

Cir.1980); *Williams*, 451 F.Supp. at 1124. Furthermore, plaintiffs have failed to show that any female employees, other than the named plaintiffs in this action, have suffered from retaliatory treatment. Accordingly, Henoch's claims of retaliatory treatment do not present common questions of law or fact with the class claims.

2. *Patricia Sheehan*

Sheehan was hired by Courier in 1971 as an office manager in its corporate headquarters. Like Henoch, Sheehan enjoyed steady promotions in her early years of employment—she was promoted to Staff Assistant Vice President in 1975 and to Staff Vice President in charge of purchasing and office services in 1977. Sheehan earned a starting salary with Courier of $12,000 per year in 1971 and was earning $28,000 per year when her employment was terminated in 1981. McMahon Aff. at ¶ 3.

Sheehan claims that from "early in her employment" she was denied opportunities to move from a "staff" position at corporate headquarters to a "line" position at a field location. She alleges that line positions provide better opportunities for advancement and salary increases, but such positions are discriminatorily denied to female employees at Courier. Sheehan further alleges that female employees were subjected to other forms of discrimination in terms and conditions of employment.

In January 1981, Sheehan and other women at Courier filed charges with the Equal Employment Opportunity Commission ("EEOC") alleging classwide discrimination. Sheehan claims that after these charges were filed, she was subjected to various forms of retaliation, including

abusive language from her supervisor, excessive supervision as to her whereabouts, pressure to repay a loan before its due date, and a reorganization of her job duties which she contends amounted to a stripping of her responsibilities and a demotion. Sheehan further claims that she was unlawfully discriminated against in the denial of a promotion to the newly created position of Corporate Vice President in charge of purchasing.

Sheehan subsequently filed additional charges with the EEOC alleging unlawful retaliation and, at the same time, petitioned this Court for a preliminary injunction reinstating her to her former position, and ordering all retaliatory conduct to cease. After two evidentiary hearings and one appeal regarding this application, preliminary injunctive relief was ultimately denied by Judge Nickerson on August 25, 1981, upon a finding that Sheehan had failed to establish a likelihood of success on the merits.

The facts surrounding Sheehan's termination are well summarized in an earlier Memorandum and Order of this Court:

> [A]n officer of [Courier], Paul Wolfrum, testified that the change in [Sheehan's] duties were part of a corporate reorganization initiated for the purpose of centralizing all purchasing under one person. . . . Because of the plaintiff's complaints that she did not understand what her new job duties were, a meeting between the plaintiff and Mr. Wolfrum was arranged for August 5, 1981. At the outset of the meeting, Mr. Wolfrum attempted to ask the plaintiff questions about a job description she had prepared. After only a few questions, the plaintiff stated that she did not wish to attend the meeting. Mr. Wolfrum responded that he was preparing to put her job duties in writing, and held up a pad on which he was making notes.

> Nonetheless, over Mr. Wolfrum's objection, the plaintiff left the meeting.
>
> Mr. Wolfrum and a co-worker then went to the plaintiff's office and asked her to return to the meeting, which she agreed to do. They resumed their conversation about the plaintiff's duties, but again the plaintiff objected—claiming it was harassment—and she again walked out of the meeting over Mr. Wolfrum's objections.
>
> Once more, Mr. Wolfrum went to the plaintiff's office and asked her to return to the meeting, but she refused. The plaintiff replied that she did not wish to attend the meeting, and Mr. Wolfrum responded that if she did not return he would have no alternative but to terminate her. The plaintiff replied, "Then I am terminated."

Sheehan v. Purolator Courier Corp., 81 Civ. 1103, slip op. (E.D.N.Y. Oct. 27, 1982).

Sheehan has basically alleged four types of claims: (1) that she was denied a transfer from a staff to a line position on account of her sex; (2) that she was denied a promotion to Corporate Vice President because of her sex and in retaliation for her complaints of sex discrimination; (3) that she was otherwise discriminated against in terms and conditions of employment on account of her sex; (4) that she was harassed, stripped of her duties and eventually discharged in retaliation for filing charges of sex discrimination with the EEOC.

For the reasons discussed with respect to Henoch, Sheehan is not an appropriate class representative for claims of discrimination in the denial of promotions, and other terms and conditions of employment. Sheehan, like Henoch, was a Staff Vice President, a relatively high level

position within the broad range of positions encompassed by the proposed class of all female exempt employees. She challenges the denial of a promotion to an even higher level position as an officer of Courier. The interests of an employee holding a high level position, the success of the employee in achieving such a position, and her experience in being denied a promotion to an even higher level position, render the employee an inappropriate class representative for other employees claiming discrimination at the lower end of the corporate hierarchy. See the discussion in Section III, B.1, *supra*.

These same factors make Sheehan an inappropriate class representative for claims of discriminatory denial of transfers from staff to line positions. The considerations that underlie a decision regarding a lateral transfer from an upper level staff position to an equivalent line position are "hardly typical" of the considerations underlying a staff to line transfer between lower level positions, such as secretary or customer service representative. *Cf. Rowe*, 26 FEP Cases at 1147 (claim of an upper level employee denied a promotion is "hardly typical" of claims of lower level employees). Furthermore, plaintiffs have failed to identify even one other female employee who was allegedly denied a staff to line transfer for discriminatory reasons. Sheehan, therefore, cannot represent a class of female exempt employees allegedly denied such transfers.

Sheehan is also not an appropriate class representative with respect to claims of retaliatory treatment and discharge. As discussed earlier, claims of retaliatory treatment, which require proof of highly individualized facts, generally do not present suitable issues for class ac-

tions. *Pendleton v. Shlesinger*, 73 F.R.D. 506 (D.D.C. 1977); *aff'd sub nom. Pendleton v. Rumsfeld*, 628 F.2d 102 (D.C.Cir.1980); *Strong v. Arkansas Blue Cross & Blue Shield, Inc.*, 87 F.R.D. 496, 511 (E.D.Ark.1980); *Williams v. Boorstin*, 451 F.Supp. 1117, 1124 (D.D.C.1978), *rev'd on other grounds*, 663 F.2d 109 (D.C.Cir.1980), *cert. denied*, 451 U.S. 985, 101 S.Ct. 2319, 68 L.Ed.2d 842 (1981). Indeed, the peculiar facts surrounding Sheehan's claim of retaliatory discharge may render her an inappropriate representative for any class claims. *See Strong*, 87 F.R.D. at 511. Sheehan's claim of retaliatory discharge has been challenged with a defense of insubordination. Defendants allege that she was discharged for leaving a meeting called to redress her grievances and refusing to return to the meeting after she was requested to do so. This Court already found, when ruling on defendants' motion for summary judgment, that "insubordination was the immediate motivating factor for [Sheehan's] termination," but a factual issue remains for trial as to "whether this was the *sole* motivating factor." *Sheehan v. Purolator Courier Corp.*, 81 Civ. 1103, slip op. at 10 (E.D.N.Y. Oct. 27, 1982). The particular circumstances of Sheehan's alleged insubordination and subsequent discharge, which would necessarily be the focus of her case at trial, are not typical of the class claims and therefore make her an inadequate representative of the class. *Armour v. Anniston*, 89 F.R.D. 331, 332 (N.D.Ala.1980), *aff'd* 654 F.2d 382 (5th Cir. 1981); *Nelson v. Mustian*, 502 F.Supp. 698, 704 (N.D.Fla.1980). *See also Patterson v. General Motors Corp.*, 681 F.2d 476, 481 (7th Cir.1980), *cert. denied*, 451 U.S. 914, 101 S.Ct. 1988, 68 L.Ed.2d 304 (1981) (the named plaintiff was not

a proper class representative where his claims were subject to a unique defense).

3. *Kayhan Hellriegel*

Hellriegel was hired as a billing clerk in Courier's Chicago terminal in 1969. In 1970, she joined the staff of Courier's midwestern vice president, as regional billing clerk. Hellriegel left Courier's employ in 1972 to accompany her husband to Canada, but returned to the company in 1974 as regional administrative manager. In January 1975, she was transferred, at her request, to a marketing representative (i.e., salesperson) position. Hellriegel became the senior district manager of the Chicago terminal in October 1975, and her title was changed to regional manager in 1976. She was promoted to senior regional manager in 1978. Defendants' Memorandum at 13-14.

When Hellriegel returned to Courier in 1974, she earned a salary of $12,000 per year. In January 1981, three months before her resignation from the company, Hellriegel's base salary was increased to approximately $40,500 per year, the fourth highest base salary among the 23 senior regional managers at Courier. In 1980, her last full year of employment at Courier, Hellriegel's base salary was the fourth highest among the 25 senior regional managers, and her total compensation (base salary plus the previous year's bonus) was the second highest among all senior regional managers and terminal managers. McMahon Aff. ¶¶ 7, 15, 21.

On or about November 1980, there was a vacancy in the position of Vice President for the Midwest Division of Courier. Hellriegel applied for that position upon the

recommendation of her direct supervisor. Hellriegel alleges that she was denied the promition to the position because she refused the sexual advances of the senior official making the selection. Vladeck Aff. ¶ 17. She further alleges that, after she reported the incident to her direct supervisor, she began to "receive great numbers of memoranda complaining of her work performance and was subjected to petty harassment, . . . her management responsibilities were reduced and subordinates were instructed to report to other managers." Vladeck Aff. ¶18. Hellriegel claims that she felt compelled to resign her position because of the harassment.

For the same reasons as discussed with respect to Henoch and Sheehan, Hellriegel is also an inappropriate class representative for claims of discrimination in promotion, compensation and other related terms and conditions of employment. Hellriegel, a high level managerial employee, was allegedly discriminated against in the denial of a promotion to an even higher level position as an officer of Courier. Her promotion claim, her experiences as a senior managerial official, and her success in achieving that position are hardly typical of the claims of low level employees included in the purported class of all female exempt employees. See the discussion in Section III, B.1, *supra*. Indeed, Hellriegel's employment history at Courier runs contrary to many of the class claims. She was not restricted to a "staff" position; she was employed in a "line" position at the Chicago terminal. She was not kept in a lower level position; she rose rapidly to a senior managerial position. Hellriegel was also one of the highest paid senior regional managers at Courier. While the salary statistics alone are not dispositive of the salary

discrimination claim, Hellriegel's relatively high salary indicates that she will face a heavy burden in establishing salary discrimination, and her claim is therefore atypical of the allegedly widespread salary discrimination asserted as a class claim.[12]

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12. Hellriegel may also be an inappropriate class representative for members of the purported class who were employed at Courier's Chicago terminal during her tenure as terminal manager. The adequacy of representation requirement of Rule 23(a)(4) has been interpreted as prohibiting the appointment of class representatives who have conflicts of interest with class members. *Falcon*, 457 U.S. at 157-58, n. 13, 102 S.Ct. at 2371 n. 13; *Rossini v. Ogilvy & Mather, Inc.*, 80 F.R.D. 131, 135 (S.D. N.Y.1978). As manager of the Chicago terminal, Hellriegel was responsible for approving promotion decisions and setting salaries for all employees under her supervision. Wolfrum Aff. ¶¶ 8, 37, 38, 48. To the extent that female exempt employees at the Chicago terminal have claims of discrimination in promotion and compensation, Hellriegel, as class representative, would be charged with representing employees who challenge acts that Hellriegel herself ratified in her official capacity as terminal manager. This direct conflict of interest may make Hellriegel an inappropriate representative for members of the purported class who were employed at the Chicago terminal during her tenure as terminal manager. *Cf. Gilchrist v. Bolger*, 89 F.R.D. 402, 408 (S.D.Ga.1981), *aff'd in pertinent part*, 733 F.2d 1551, 1555 (11th Cir.1984) (nonsupervisory employees cannot represent supervisory employees); *Rowe v. Bailar*, 26 FEP Cases 1145, 1146 n. 5 (D.D.C.1981) (proposed class that includes some members who supervised other members "raises a question as to differing interests" among class members); *Rossini v. Ogilvy & Mather, Inc.*, 80 F.R.D. 131, 135-36 (S.D.N.Y.1978).

As discussed in note 9, *supra*, this Court does not believe that *Rossini* is controlling with respect to the appropriateness of Henoch and Sheehan as class representatives. The rationale of *Rossini* is applicable, however, to an assessment of Hellriegel's ability to adequately represent employees of the Chicago terminal. In *Rossini*, the court reasoned that a vice president of the defendant corporation could not adequately represent a class of female employees because the vice president's

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Hellriegel's claims of sexual harassment and retaliatory treatment do not present issues suitable for class actions. The harassment claim rests on a highly personal and individualized set of facts; Hellriegel's allegation that she was denied a promotion to divisional vice president after she rejected the sexual advances of the official selecting the new vice president. In light of the broad class Hellriegel seeks to represent, it is doubtful that the claim presents common questions of law or fact, or that it is "typical" for Courier to condition promotions on the granting of sexual favors. *See Martin v. Easton Pub. Co.*, 73 F.R.D. 678 (E.D.Pa.1977). Similarly, Hellriegel's claims of retaliatory treatment, which require proof of highly individualized facts, are not suitable for class treatment. See the discussion in Section III, B.1, *supra*.

While the above discussion establishes that Hellriegel is not an appropriate representative for the presently proposed class of all female exempt employees, I must reject defendants' contention that Hellriegel is inherently unsuitable as a class representative because her credibility is allegedly vulnerable to attack. The credibility of a witness is a potentially critical issue in any litigation. If an employer could disqualify the representative of a class of his employees by merely raising a collateral attack on the representative's credibility, it is conceivable that no

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duties to the corporation, as an officer, included assuring compliance with "proper peronnel policies and lawful hiring and promotion practices." 80 F.R.D. at 135. Hellriegel was similarly responsible for overseeing Courier's compensation and promotion practices at the Chicago terminal. She therefore cannot adequately represent persons who claim that they were adequately affected by the implementation of these practices.

employee could ever qualify as a class representative in a Title VII action. The cases cited by defendants are distinguishable from the present case and do not support the extreme proposition urged by defendants. In both *Panzirer v. Wolf*, 663 F.2d 365, 368 (2d Cir.1981), *vacated as moot*, 459 U.S. 1027, 103 S.Ct. 434, 74 L.Ed.2d 594 (1982) and *Kline v. Wolf*, 88 F.R.D. 696 (S.D.N.Y. 1981), *aff'd in pertinent part*, 702 F.2d 400 (2d Cir.1983), credibility questions were raised as to the class representatives' accounts of events that were central to the class representatives' substantive claims.[13] In the present case, defendants challenge Hellriegel's credibility through alleged incidents that are collateral to the issues in this Title VII litigation. See Defendants' Memorandum at 74-76. These credibility questions may present issues for trial, but do not render Hellriegel inherently unfit to serve as a representative of an otherwise appropriate class.

IV. CONCLUSIONS

For the reasons discussed above, it would be improper to certify a class in this action of all female exempt employees of Courier. A narrower class of upper level employees may be appropriate for certification, *see Lo Re v. Chase Manhattan Corp.*, 431 F.Supp. 189, 197-98 (S.D.N.Y. 1977), but the plaintiffs have not articulated any basis for

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13. *Panzirer* and *Kline* were class actions, brought under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, challenging the same allegedly false and misleading statements contained in a corporation's annual reports. In both cases, the credibility questions concerned the class representatives' assertions that they had relied on the allegedly misleading statements. "Reliance" was a critical element in both of the representatives' substantive claims.

defining such a class. Furthermore, the plaintiffs have failed to make an adequate showing of the existence of a class of aggrieved employees. Plaintiffs' motion for certification of a class of all female exempt employees of Courier is, therefore, denied.

In light of the conclusion that the named plaintiffs cannot be certified as representatives of the proposed class, it is not necessary to decide whether the class must be limited to the offices or areas where the named plaintiffs worked, or whether the class should include future employees who were not employed by Courier at the time of certification.

APPENDIX D

EDNY
81 cv 1103
82 cv 0438
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UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of February one thousand nine hundred and eighty-eight.

Present: HON. WILLIAM H. TIMBERS,
HON. THOMAS J. MESKILL,
HON. AMALYA L. KEARSE,
Circuit Judges,

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYAN HELLRIEGEL, on Behalf of themselves and All Others Similarly Situated, Appellants, v. PUROLATOR, INC. and PUROLATOR COURIER CORP., Appellees.	No. 87-7540 (Filed February 12, 1988)

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

Elaine B. Goldsmith,
Clerk

A TRUE COPY
ELAINE B. GOLDSMITH

/s/ Elaine B. Goldsmith
Clerk

/s/ Edward J. Guardaro
Edward J. Guardaro
Deputy Clerk

ISSUED AS MANDATE: May 10, 1988

GLASSER 0726
EDNY
81 cv 1103
82 cv 0438

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

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ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

Elaine B. Goldsmith,
Clerk

/s/ Edward J. Guardaro
Edward J. Guardaro
Deputy Clerk

THE MANDATE, CONSISTING OF THE ITEMS BELOW, HAS BEEN RECEIVED.

/ ✓ / OPINION / ✓ / ORDER

/ ✓ / STATEMENT OF COSTS

REC'D. BY ..... DATE .....

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of April one thousand nine hundred and eighty-eight.

PATRICIA SHEEHAN, ELIZABETH HENOCH, and KAYHAN HELLRIEGEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

PUROLATOR, INC. and PUROLATOR COURIER CORP.,

Defendants-Appellees.

No. 87-7540

(Filed April 13, 1988)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants, Patricia Sheehan, Elizabeth Henoch and Kayhan Hellriegel, on behalf of themselves and all others similarly situated,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-10

PATRICIA SHEEHAN, ET AL.,

Applicants,

v.

PUROLATOR, INC., AND
PUROLATOR COURIER CORP.

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 11, 1988.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 12th
day of July, 1988.